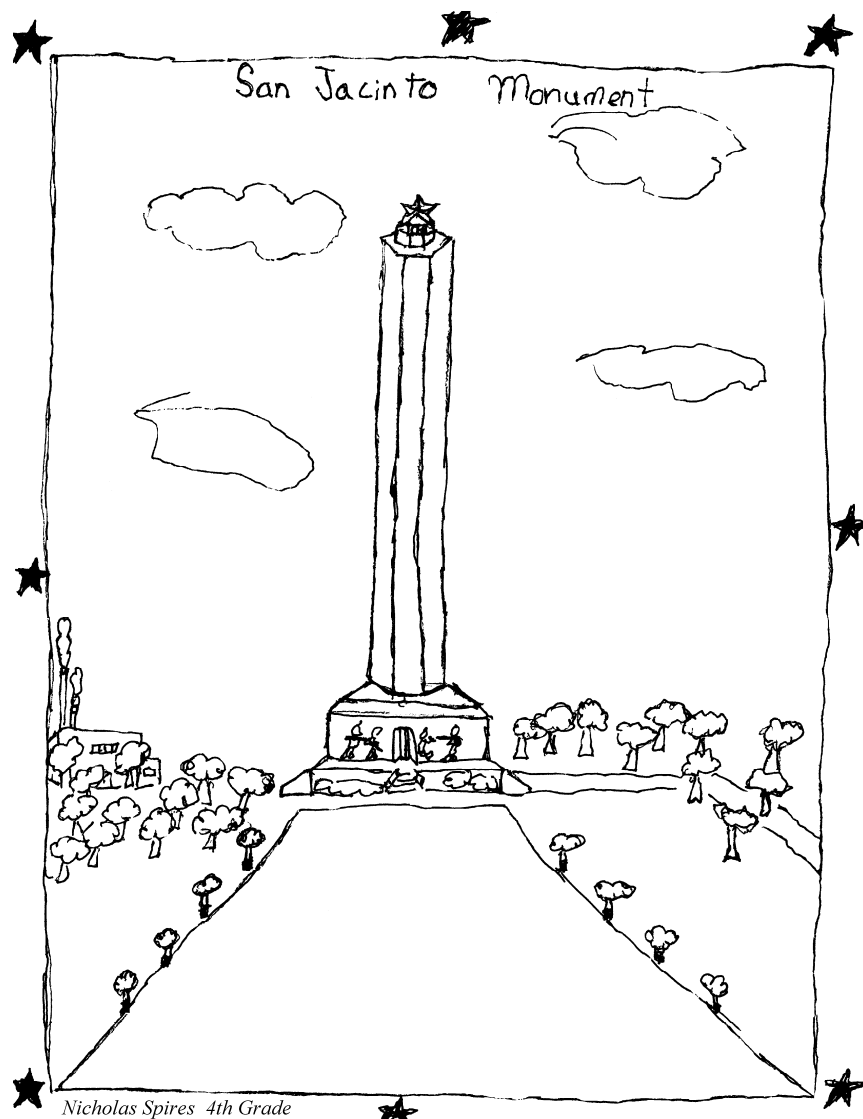

TEXAS REGISTER

Volume 34 Number 16

April 17, 2009

Pages 2421 - 2568



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register's* Internet site:
<http://www.sos.state.tx.us/open/index.shtml>

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.

<http://www.oag.state.tx.us/opinopen/opengovt.shtml>

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
<http://www.state.tx.us/>

...

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for April 2, 2009

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2015, Mirella Garcia of El Paso (replacing Teresa Petersen of Brazoria whose term expired).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2015, Barbara W. James of Austin (Ms. James is being reappointed).

Appointed to the Early Childhood Intervention Advisory Committee for a term to expire February 1, 2015, Diane Turner Kazlow of Plano (Ms. Kazlow is being reappointed).

Appointed to the Texas Historical Records Advisory Board for a term to expire February 1, 2012, J.P. "Pat" McDaniel of Midland (Mr. McDaniel is being reappointed).

Appointed to the Texas Historical Records Advisory Board for a term to expire February 1, 2013, Christopher LaPlante of Austin (Ms. LaPlante is being reappointed).

Appointments for April 6, 2009

Appointed to be the Presiding Judge of the Second Administrative Judicial Region for a term to expire four years from the date of qualification, Olen U. Underwood of Willis. Judge Underwood is being reappointed.

Appointed to be Judge of the 141st Judicial District Court, Tarrant County for a term until the next General Election and until his successor shall be duly elected and qualified, John P. Chupp of Arlington. Mr. Chupp is replacing Judge Len Wade who resigned.

Appointed to the State Health Services Council for a term to expire February 1, 2015, Lewis E. Foxhall of Houston (Dr. Foxhall is being reappointed).

Appointed to the State Health Services Council for a term to expire February 1, 2015, Glenda Rubin Kane of Corpus Christi (Ms. Kane is being reappointed).

Appointed to the State Health Services Council for a term to expire February 1, 2015, Nasruddin Rupani of Sugar Land (replacing Rudy Arredondo of Lubbock whose term expired).

Appointed to the Family and Protective Services Council for a term to expire February 1, 2015, Christina Rawls Martin of Mission (replacing Faith Johnson of DeSoto whose term expired).

Appointed to the Family and Protective Services Council for a term to expire February 1, 2015, Imogen Sherman Papadopoulos of Houston (Ms. Papadopoulos is being reappointed).

Appointed to the Family and Protective Services Council for a term to expire February 1, 2015, Scott Rosenbach of Amarillo (replacing Richard Hoffman of Brownsville whose term expired).

Appointed to the Correctional Managed Health Care Committee for a term to expire February 1, 2015, Gerald Evenwel, Jr. of Mount Pleasant. Mr. Evenwel is replacing Jean Frazier of San Antonio whose term expired.

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2013, William I. Dillard of Uvalde (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, W. Scott Bledsoe, III of Oakville (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, Fernando Camarillo of Boerne (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, James T. Clancy of Portland (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, Lindsey Koenig of Orange Grove (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, Curt Raabe of Poth (reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2015, Thomas M. Reding, Jr. of Portland (reappointed).

Rick Perry, Governor

TRD-200901378



THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following:
Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from
the Attorney General's Internet site <http://www.oag.state.tx.us>.

Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: <http://www.oag.state.tx.us/opinopen/opinhome.shtml>.)

Request for Opinions

RQ-0790-GA

Requestor:

The Honorable Frank Corte Jr.
Chair, Committee on Defense & Veterans' Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Re: Authority of the Kinney County Groundwater Conservation District to impose certain conditions on permit holders and applicants (RQ-0790-GA)

Briefs requested by May 4, 2009

RQ-0791-GA

Requestor:

The Honorable Garnet F. Coleman
Chair, Committee on County Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Re: Background checks for license holders or applicants under section 6.031 of the Texas Racing Act, article 179e, V.T.C.S. (RQ-0791-GA)

Briefs requested by May 4, 2009

RQ-0792-GA

Requestor:

The Honorable Anna L. Cavazos Ramirez
Webb County Attorney
1110 Washington Street, Suite 301
Laredo, Texas 78040

Re: Whether an appraisal district may conduct its appraisals on other than an annual basis (RQ-0792-GA)

Briefs requested by May 7, 2009

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200901371
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: April 7, 2009

◆ ◆ ◆

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. ~~[Square brackets and strikethrough]~~ indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.1, §255.8

The Office of Rural Community Affairs (Office) proposes amendments to §255.1, concerning an appeals process for recommendations of awards, contingent upon enactment of House Bill 1079 and §255.8, concerning Regional Review Committees.

The proposed amendments will modify the appeal of Texas Community Development Block Grant Program actions (§255.1) and the appeal of Regional Review Committee decisions (§255.8). The amendments will eliminate any reference to Texas Capital Fund appeals.

Charles S. (Charlie) Stone, Executive Director of the Office, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for the state or local governments as a result of enforcing or administering the amended sections.

Mr. Stone also has determined that for each year of the first five years the amendments are in effect, the public benefit as a result of enforcing the amended sections will be the equitable allocation of Community Development Block Grant non-entitlement are funds to eligible units of general local government in Texas. There will be no costs to small business or individuals.

Comments on the proposal may be submitted to Mark Wyatt, Director of Community Development, Office of Rural Community Affairs, P.O. Box 12877, Austin, Texas 78711, telephone: (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the §487.052 of the Government Code, which provides the governing board with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendments.

§255.1. General Provisions.

(a) - (f) (No change.)

(g) Appeals. An applicant for funding under the TxCDBG₂ except for the Texas Capital Fund, may appeal the disposition of its application in accordance with this subsection.

(1) The appeal may only be based on one or more of the following grounds.

(A) Misplacement of an application. All or a portion of an application is lost, misfiled, or otherwise misplaced by Office staff ~~[and, in the case of TCF applications, by TDA staff,]~~ resulting in unequal consideration of the applicant's proposal.

(B) Mathematical error. In rating the application, the score on any selection criteria is incorrectly computed by the Office ~~[and, in the case of TCF applications, by the TDA]~~ due to human or computer error.

(C) Other procedural error. The application is not processed by the Office ~~[and, in the case of TCF applications, by the TDA,]~~ in accordance with the application and selection procedures set forth in this subchapter. Procedural errors alleged to have been committed by a regional review committee may only be appealed in accordance with the provisions of §255.8 of this title (relating to Regional Review Committees).

(2) The appeal must be submitted in writing to the TxCDBG of the Office no later than 30 days after the date the announcement of ~~[community development fund and planning/capacity building fund]~~ contract awards is published on [in] the Office's website. [Texas Register. In addition, timely appeals not submitted in writing at least five working days prior to the next regularly scheduled meeting of the state review committee will be heard at the subsequent meeting of the state review committee.] The Office staff will evaluate the appeal and may either concur with the appeal and make an appropriate adjustment to the applicant's scores, or disagree with the appeal and prepare an appeal file for consideration by the Executive Director. ~~[state review committee at its next regularly scheduled meeting. The state review committee will make a final recommendation to the executive director of the Office. The decision of the executive director of the Office is final. If the appeal concerns a TCF application, the appeal must be submitted in writing to the TDA no later than 10 days following the date of the notification letter of the denial. If the appeal concerns a disaster relief fund or urgent need fund application, the appeal must be submitted in writing to the Office no later than 30 days following the date of the notification letter of the denial. The staff of either the Office or the TDA, when appropriate, evaluates the appeal and may either concur with the appeal or disagree with the appeal and prepare an appeal file for consideration by the appropriate executive director.]~~ The executive director~~;~~ of the agency with which the appeal was filed~~;~~ then considers the appeal within 30 days and makes a final decision.

(3) In the event the appeal is sustained and the corrected scores would have resulted in project funding, the application is approved and funded. If the appeal concerning an ~~a~~ community develop-

ment fund or planning/capacity building fund] application is rejected, the office notifies the applicant of its decision, including the basis for rejection [after the meeting of the state review committee at which the appeal was considered. If the appeal concerns a TCF application, the applicant will be notified of the decision made by the appropriate executive director within ten days after the final determination by the executive director].

(4) Appeal of Executive Director's Decision to the Board.

(A) If the appealing party is not satisfied with the Executive Director's response to the appeal, it may appeal in writing directly to the board within seven days after the date of the Executive Director's response. In order to be placed on the next agenda of the board, the appeal must be received by the Office at least fourteen days prior to the next scheduled board meeting. Appeals received after the fourteenth calendar day prior to the board meeting will be scheduled for the next board meeting. The Executive Director shall prepare an appeal file for the board's review based on the information provided. If the appealing party receives additional information after the Executive Director has denied the appeal, but prior to the posting of the appeal, for board consideration, the new information must be provided to the Executive Director for further consideration or the board will not consider any information submitted by the applicant after the written appeal. New information will cause the deadlines in this subparagraph to begin again. The board will review the appeal de novo and may consider any information properly considered by the Office in making its prior decision(s).

(B) Public comment. The board hears public comment on the appeal under its usual procedures. Persons making public comment are not parties to the appeal and no rights accrue to them under this section or any other appeal process. Nothing in this section provides a right to appeal any decision made on an application if the appealing party does not have direct grounds to appeal.

(C) Possible actions regarding applications. In instances in which the appeal is sustained by the board could have resulted in an award to the applicant, the application shall be approved by the board contingent on the availability of funds. If the appeal is denied, the Office shall notify the applicant of the decision.

(5) Decisions are final. Appeals not submitted in accordance with the section will not be considered. The decision of the board is final.

~~[(4) An applicant for a grant, loan, or award under a community development block grant program may appeal a decision of the state review committee by filing a complaint with the Board. The Board will hold a hearing on a complaint filed with the Board and render a decision.]~~

~~[(5) Appeals not submitted in accordance with this subsection are dismissed and may not be refiled.]~~

(h) - (aa) (No change.)

§255.8. *Regional Review Committees.*

(a) - (k) (No change.)

(l) Appeals. Appeals will be handled in accordance with the following procedures:

(1) - (5) (No change.)

~~[(6) ORCA Forwards Funding Recommendations to the SRC. Following resolution of regional appeals, ORCA staff will make funding recommendations to the State Review Committee for the 2009 and 2010 program years. The SRC consists of 12 elected officials, including a chairman appointed by the Governor. In consul-~~

~~tation with the executive director and TxCDBG office staff, the State Review Committee is responsible for reviewing and approving grant applications and associated funding awards of eligible counties and municipalities.]~~

(6) ~~[(7)] Applicants May Appeal a [A] Decision of the ORCA Executive Director [SRC] and File a Complaint with the ORCA Board. An applicant [applying under the CD Fund] may appeal a decision of the ORCA Executive Director [SRC] by filing a complaint with the ORCA Board. The ORCA Board shall hold a hearing on a complaint filed with the Board and render a decision. After the ORCA Board renders a final decision, ORCA will notify the region of the determination and post the final rankings for the region.~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901360

Charles S. (Charlie) Stone

Executive Director

Office of Rural Community Affairs

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 936-6734



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER T. MINIMUM STANDARDS FOR MEDICARE SUPPLEMENT POLICIES

28 TAC §§3.3303, 3.3306, 3.3308, 3.3319, 3.3322, 3.3326

The Texas Department of Insurance proposes amendments to §§3.3303, 3.3306, 3.3308, 3.3319, and 3.3322 and new §3.3326, concerning minimum standards for Medicare supplement policies issued or issued for delivery in this state. The proposed amendments and new section are necessary to incorporate the latest revisions to the National Association of Insurance Commissioners (NAIC) model rules concerning Medicare supplement insurance into the Department's existing Medicare supplement insurance rules. The revisions to the NAIC model rules were promulgated by the NAIC pursuant to the Medicare Improvements for Patients and Providers Act of 2008, Public Law 110 - 275 (MIPPA), which amends 42 U.S.C. §1395ss to overhaul the Medicare supplement plans and benefits, and pursuant to the Genetic Information Nondiscrimination Act of 2008, Public Law 110 - 233 (GINA), which amends 42 U.S.C. §1395ss to limit use of genetic testing and genetic information. The Insurance Code §1652.005 requires the Commissioner to adopt reasonable rules necessary and proper to carry out Chapter 1652 (which regulates Medicare supplement benefit plans), including rules adopted in accordance with federal law relating to the regulation of Medicare supplement benefit plan coverage that are necessary for the State of Texas to retain certification as a state with an approved

regulatory program for Medicare supplement insurance in compliance with 42 U.S.C. §1395ss. Adoption and implementation of the NAIC model rules by the Department is necessary for the State of Texas to retain certification as a state with an approved regulatory program for Medicare supplement benefit plans.

Proposed amendments to §3.3303 add definitions for frequently used terminology in the subchapter and renumber paragraphs as necessary for inclusion of the new definitions. New paragraph (1) defines "1990 Standardized Medicare supplement benefit plan" to refer to policies issued on or after the effective date for plan revisions made in conformity with the Omnibus Budget Reconciliation Act of 1990 (OBRA). New paragraph (2) defines "2010 Standardized Medicare supplement benefit plan" to refer to policies with an effective date for coverage on or after June 1, 2010. New paragraph (21) defines "Pre-Standardized Medicare supplement plan" to refer to policies issued prior to the effective date for plan revisions made in conformity to OBRA. These definitions are necessary to make a clear distinction between the three separately regulated plan classifications and to conform to the NAIC model rules. Finally, paragraphs (1) - (18) are proposed to be redesignated as paragraphs (3) - (20), and paragraphs (19) - (21) are proposed to be redesignated as paragraphs (22) - (24).

Proposed new §3.3306(a) provides minimum benefit standards for the new 2010 Standardized Medicare supplement benefit plan policies or certificates. Proposed §3.3306(a)(1)(A) specifies restrictions and exceptions for the exclusion of preexisting conditions. Proposed §3.3306(a)(1)(B) prohibits a Medicare supplement policy or certificate from indemnifying against losses resulting from sickness on a different basis than losses resulting from accidents. Proposed §3.3306(a)(1)(C) provides that cost-sharing provisions in the plans shall be amended to conform to applicable Medicare deductibles, copayments and benefit amounts as necessary. Proposed §3.3306(a)(1)(D) restricts termination of coverage of a spouse to nonpayment of premium and prohibits cancellation and nonrenewal by the insurer solely on the grounds of deterioration of health. Proposed §3.3306(a)(1)(E) specifies that policies must be guaranteed renewable, provides restrictions on plan cancellation and includes provisions for continued coverage in cases where a policy is terminated by the group policyholder. Proposed §3.3306(a)(1)(F) specifies the restrictions on the determination and effect of a continuous loss. Proposed §3.3306(a)(1)(G) specifies the conditions for suspension and re-institution of coverage in cases where the policyholder becomes eligible for or loses eligibility for benefits under the Social Security Act. Proposed §3.3306(a)(2) provides that issuers must offer a policy or certificate including only the enumerated basic core package of benefits in addition to any of the standardized Medicare supplement insurance plans that may be offered. The basic core package of benefits is described in §3.3306(a)(2)(A) - (F) and includes coverage of Part A Medicare eligible expenses for hospitalization in various situations, coverage under Medicare Parts A and B for the reasonable cost of the first three pints of blood, coverage for the coinsurance amount of Medicare eligible expenses under Part B, and coverage of cost sharing for all Part A Medicare eligible hospice and respite care expenses. Proposed §3.3306(a)(3) specifies standards for additional benefits that must be included in Plans B, C, D, F, F with High Deductible, G, M, and N. The additional benefits are described in §3.3306(a)(3)(A) - (E) and include required additional coverage for the Medicare Part A inpatient hospital deductible, coverage under Part A for post-hospital skilled nursing facility care, coverage for the Medicare Part B deductible, coverage for Medicare

Part B excess charges, and coverage for medically necessary emergency care in a foreign country.

Proposed new §3.3306(b) sets forth the additional standards for the issuance of the new 2010 Standardized Medicare supplement benefit plan policies and certificates, a detailed description for each of the new benefit plans, and a procedure for the addition of new or innovative benefits to a standardized plan. Proposed §3.3306(b)(1) requires an issuer to offer a policy form or certificate form with only the basic core benefits and also offer either standardized benefit Plan C or standardized benefit Plan F if the issuer makes available any additional benefits described in §3.3306(a)(3) or standardized benefit Plan K or standardized benefit Plan L. Proposed §3.3306(b)(2) restricts the sale of Medicare supplement plans to the plans (Plans A - D, F, F with High Deductible, G, and K - N) provided in the rules and clarifies that no other groups, packages, or combination of benefits may be offered. Proposed §3.3306(b)(3) mandates a uniformity requirement for plan structure, language and format. Proposed §3.3306(b)(4) allows plan designations to be modified by the issuer to the extent permitted by law. Proposed §3.3306(b)(5) provides a detailed description for each of the 2010 Standardized Benefit Plans (Plans A - D, F, F with High Deductible, G, and K - N). Proposed §3.3306(b)(6) allows issuers to provide, upon Departmental approval, new or innovative benefits with a standardized plan, in addition to the standardized benefits provided in a policy or certificate that otherwise complies with the applicable standards. Under proposed §3.3306(b)(6), the following requirements apply to any new or innovative benefits: (i) they must include only benefits that are appropriate to Medicare supplement insurance; (ii) they must be new or innovative; (iii) they must not be otherwise available; (iv) they must be cost-effective; (v) the approval of the new or innovative benefits must not adversely impact the goal of Medicare supplement simplification; (v) they must not include an outpatient prescription drug benefit; and (vi) they cannot be used to change or reduce benefits, including a change of any cost-sharing provision, in any standardized plan.

Reorganization and structural changes made to the standardized plans described in proposed §3.3306(b)(5) include the elimination of Plan E, Plans H - J, and High-Deductible Plan J, the addition of Plans M and N, and the restructuring of Plans D and G. Prescription drug benefits were removed from the eliminated plans by the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003. In addition, the NAIC removed the Preventative Care and At-Home Recovery benefits from the standardized plans because of under-utilization and the lesser need for these types of benefits. These benefits were removed by the NAIC after considerable discussion and collaboration among policymakers and stakeholders during the reorganization of the plans. Upon removal of prescription drug benefits under the MMA and removal of the Preventative Care and At-Home Recovery benefits during reorganization under MIPPA, the eliminated plans were duplicative of other plans and became unnecessary. Plans D and G were retained but were necessarily restructured to reflect these benefit changes. During the reorganization process, the new plans were designed to give beneficiaries new options for higher cost-sharing with a lower premium. New Plan M provides 50% coverage of the Part A deductible and no coverage of the Part B deductible. New Plan N provides 100% coverage of the Part A deductible and no coverage of the Part B deductible.

For transitional purposes, the minimum benefit standards for the 1990 Standardized Medicare supplement benefit plan policies or

certificates and the composition requirements of those plans are included in §3.3306(c) and (d). Proposed new §3.3306(c) corresponds to the existing §3.3306(1) - (3) and new §3.3306(d) corresponds to the existing §3.3306(4) - (5). No significant changes are proposed to the text of those renumbered sections, except that §3.3306(c)(3)(K) is proposed to be deleted and moved to 3.3306(d)(2)(O) without changes. This amendment is necessary to conform the existing rules to the structure of the NAIC model rules.

Proposed amendments to §3.3308(c)(1) and (2) update and correct internal references, delete the existing outline of coverage provided in existing Figure: 28 TAC §3.3308(c)(2)(D), and adopt by reference form LHL 050 Rev. 12/04 and form LHL 050 Rev. 06/09. The new outline of coverage specified in form LHL 050 Rev. 06/09, which is adopted by reference in new §3.3308(c)(2)(E), provides a detailed description of plan benefits for all plans that must be provided to all applicants. The new outline of coverage, which follows the same format as the existing outline of coverage in form LHL 050 Rev. 12/04, contains information regarding the new plans and, where applicable, dollar amounts have been updated to show amounts paid by Medicare for the current calendar year. Issuers are required to update the dollar amounts paid by Medicare for future calendar years under the proposed amendment to §3.3308(c)(2)(A). The existing outline of coverage, formerly provided in Figure: 28 TAC §3.3308(c)(2)(D), is provided without change in form LHL 050 Rev. 12/04 and is adopted by reference for transitional purposes in new §3.3308(c)(2)(F).

Proposed amendments to §3.3322 increase the number of additional policy certificate forms of the same type of policy that an issuer may offer and provide additional exceptions to the prohibition against the offering of multiple forms of the same type. Typically, an issuer may not file for approval of more than one form of a policy or certificate of each type. The amendments propose two new exceptions to the prohibition against multiple forms of the same type. Up to four policy forms of the same type may be offered for the addition of either direct response or agent marketing methods and for the addition of either guaranteed issue or underwritten coverage. These amendments update the existing rule to conform to the additional policy standards provided for in the NAIC model rules.

Proposed new §3.3326 is necessary to comply with the GINA, which amends 42 U.S.C. §1395ss to limit use of genetic testing and genetic information. Proposed new §3.3326 applies to all Medicare supplement policies and certificates with policy years beginning on or after May 21, 2009. The proposed new section prohibits the uses of genetic information in the issuance or pricing of a policy or certificate, including a prohibition on the imposition of any exclusion of benefits based on a pre-existing condition on the basis of genetic information. The new section additionally prohibits an issuer from requiring or requesting that an individual or a family member undergo genetic testing except under strict conditions for research purposes. Conditions include requirements that: (i) the request is made pursuant to research that complies with 45 C.F.R. 46 or equivalent federal regulations and any applicable state or local law; (ii) the issuer clearly indicates to the individual that the request is voluntary and will have no effect on enrollment status or premium or contribution amounts; (iii) the genetic information shall not be used for purposes related to underwriting, eligibility, premium rates, issuance, renewal or replacement; (iv) the issuer notifies the Commissioner in writing; and (v) the issuer complies with other such conditions as the Commissioner may by regulation require. The

new section also includes several definitions for terms frequently used within the new section. These definitions are necessary for purposes of clarity in implementing, enforcing, and complying with the §3.3326 prohibitions.

In addition to the foregoing proposed amendments and new section, the Department is proposing minor changes throughout the sections to correct form and grammar, to make clarifications, to correct citations, to update examples and references to form numbers, and to organize the sections in conformity with the NAIC model rules.

FISCAL NOTE. Ana Smith-Daley, Deputy Commissioner, Life/Health Division, has determined that for each year of the first five years the proposal will be in effect, there will be no measurable fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Smith-Daley has also determined that for each year of the first five years the proposed amendments and new section are in effect, there are a number of public benefits anticipated. The public benefits anticipated as a result of the proposed sections will be Texas' continued compliance with federal standards and requirements relating to regulation of Medicare supplement coverage, the availability of modernized Medicare supplement plans, and protection against the adverse use of genetic information. The Insurance Code §1652.005 requires the Commissioner to adopt reasonable rules necessary and proper to carry out Chapter 1652 (which regulates Medicare supplement benefit plans), including rules adopted in accordance with federal law relating to the regulation of Medicare supplement benefit plan coverage that are necessary for the State of Texas to retain certification as a state with an approved regulatory program for Medicare supplement insurance in compliance with 42 U.S.C. §1395ss. The proposed amendments and new section are required by and are consistent with federal law (MIPPA and GINA) and do not impose requirements on any individual or entity that are in addition to those imposed by the federal laws. Insurers are required to comply with these federal laws pursuant to Insurance Code §1652.051(a)(2). Any costs to such persons for each year of the first five years the proposed amendments and new section will be in effect are the result of the federal enactment and implementation of MIPPA and GINA and the state enactment of the Insurance Code §1652.005 and not the result of the adoption, enforcement, or administration of the proposed amendments and proposed new section.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that this proposal will not have an adverse economic effect on small business or micro business health benefit plans that are required to comply with the proposal. Because the proposal does not impose any new requirements or costs that are in addition to those imposed under federal law, with which businesses, regardless of size, must comply, any costs to persons required to comply with these proposed amendments and new sections are the result of the enactment of the federal laws, the MIPPA and GINA, and state law §1652.005 of the Insurance Code and not the result of the adoption, enforcement, or administration of the proposed amendments and new section. The proposed amendments and new section are consistent with the requirement in the Insurance Code §1652.005 that the Commissioner adopt rules

that are necessary for the State of Texas to retain certification as a state with an approved regulatory program for Medicare supplement insurance in compliance with 42 U.S.C. §1395ss. The proposed amendments and new section are required by and are consistent with federal law (MIPPA and GINA) and do not impose requirements on any individual or entity that are in addition to those imposed by the federal laws. Because the rule amendments and new sections are mandated by the Legislature and federal law, they are considered per se consistent with the health, safety, or environmental and economic welfare of the state, and therefore the Department in accordance with the Government Code §2006.002(c) is not required to consider other regulatory methods.

TAKINGS IMPACT ASSESSMENT. Ms. Smith-Daley has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on May 18, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be submitted simultaneously to Ana Smith-Daley, Deputy Commissioner, Life/Health Division, Mail Code: 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed pursuant to the Insurance Code §§1652.005, 1652.051(a)(2), 1652.151, 1652.152 and 36.001. Section 1652.005 provides that the Commissioner shall adopt reasonable rules necessary and proper to carry out Chapter 1652, including rules adopted in accordance with federal law relating to the regulation of Medicare supplement benefit plan coverage that are necessary for this state to obtain or retain certification as a state with an approved regulatory program. Section 1652.051(a)(2) provides, in part, that the Commissioner shall adopt reasonable rules to establish specific standards for provision in Medicare supplement benefit plans and standards for facilitating comparisons of different Medicare supplement benefit plans in accordance with any model rules and regulations required by federal law. Section 1652.151 provides that rules adopted under §1652.152 must include provisions and requirements that are at least equal to those required by federal law. Section 1652.152 requires an outline of coverage to be delivered to an applicant when the applicant applies for coverage and provides that the Commissioner by rule shall prescribe the format and content of the outline of coverage. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 1652

§3.3303. *Definitions.*

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) 1990 Standardized Medicare supplement benefit plan, 1990 Standardized benefit plan, or 1990 plan--A group or individual policy of Medicare supplement insurance issued or issued for delivery on or after March 1, 1992, and with an effective date for coverage prior to June 1, 2010.

(2) 2010 Standardized Medicare supplement benefit plans, 2010 Standardized benefit plan, or 2010 plan--A group or individual policy of Medicare supplement insurance with an effective date for coverage on or after June 1, 2010.

(3) ~~[(4)]~~ Applicant--

(A) In the case of an individual Medicare supplement policy, the person who seeks to contract for insurance or other health benefits.

(B) In the case of a group Medicare supplement policy, the proposed certificate holder.

(4) ~~[(2)]~~ Bankruptcy--The situation that occurs when a Medicare Advantage organization that is not an issuer has filed, or has had filed against it, a petition for declaration of bankruptcy and has ceased doing business in this state.

(5) ~~[(3)]~~ Certificate--Any certificate issued under a group Medicare supplement policy, which certificate has been delivered or issued for delivery in this state regardless of the place where the policy was delivered or issued for delivery.

(6) ~~[(4)]~~ Continuous period of creditable coverage--The period during which an individual was covered by creditable coverage, if, during the period of the coverage, the individual had no breaks in coverage greater than 63 days.

(7) ~~[(5)]~~ Creditable coverage--Any coverage of an individual as defined in §21.1101 of this title (relating to Definitions).

(8) ~~[(6)]~~ Employee welfare benefit plan--A plan, fund or program of employee benefits as defined in 29 U.S.C. Section 1002 (Employee Retirement Income Security Act).

(9) ~~[(7)]~~ Health Maintenance Organization (HMO)--An entity as defined in 42 U.S.C. §300e(a).

(10) ~~[(8)]~~ Insolvency--The situation which occurs when an issuer has had an order of liquidation entered against it with a finding of insolvency by a court of competent jurisdiction in the issuer's state of domicile.

(11) ~~[(9)]~~ Issuer--An insurance company, fraternal benefit society, health care service plan, health maintenance organization, or any other entity delivering or issuing for delivery in this state Medicare supplement policies or certificates.

(12) ~~[(10)]~~ Medicaid--Grants to States for Medical Assistance Programs, Title XIX of the Social Security Act Amendments of 1965 as Then Constituted or Later Amended.

(13) ~~[(11)]~~ Medicare--The Health Insurance for the Aged Act, Title XVIII of the Social Security Act Amendments of 1965 as Then Constituted or Later Amended.

(14) ~~[(12)]~~ Medicare Advantage organization--An entity as defined in 42 U.S.C. §1395w-28(a)(1).

(15) ~~[(13)]~~ Medicare Advantage plan--A plan of coverage for health benefits under Medicare Part C as defined in 42 U.S.C. §1395w-28(b)(1), and includes:

(A) coordinated care plans which provide health services, including but not limited to health maintenance organization plans (with or without a point-of-service option), plans offered by provider-sponsored organizations, and preferred provider organization plans;

(B) medical savings account plans coupled with a contribution into a Medicare Advantage medical savings account; and

(C) Medicare Advantage private fee-for-service plans.

(16) [(44)] Medicare Advantage private fee-for-service plan--An entity as defined in 42 U.S.C. §1395w-28(b)(2).

(17) [(45)] MMA--The Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

(18) [(46)] Medicare Select policy or Medicare Select certificate--A Medicare supplement policy or certificate, respectively, that contains restricted network provisions.

(19) [(47)] Medicare supplement policy--A group or individual policy of accident and sickness insurance or a subscriber contract of a hospital service corporation subject to the Insurance Code, Chapter 20, or, to the extent required by federal law, an evidence of coverage issued by a health maintenance organization subject to the Texas Health Maintenance Organization Act, which policy, subscriber contract, or such evidence of coverage is advertised, marketed, or designed primarily as a supplement to reimbursements under Medicare for the hospital, medical, or surgical expenses of persons eligible for Medicare. The term does not include:

(A) a policy, contract, subscriber contract, or evidence of coverage of one or more employers or labor organizations, or of the trustees of a fund established by one or more employers or labor organizations, or combination thereof, for employees or former employees, or combination thereof, or for members or former members, or combination thereof, of the labor organizations;

(B) a policy or health care benefit plan including a policy or contract of group insurance or group contract of a hospital service corporation subject to the Insurance Code, Chapter 20, or group evidence of coverage issued by a health maintenance organization subject to the Texas Health Maintenance Organization Act, when such policy or plan is not marketed or held to be a Medicare supplement policy or benefit plan; or

(C) an individual or group evidence of coverage issued pursuant to a contract under the Federal Social Security Act, §1876 (42 USC §§1395, et seq.) by a health maintenance organization subject to the Texas Health Maintenance Organization Act (Texas Insurance Code, Chapters 20A and 843);

(D) a Medicare Advantage plan established under Medicare Part C;

(E) an Outpatient Prescription Drug plan established under Medicare Part D; or

(F) a Health Care Prepayment Plan (HCPP) that provides benefits pursuant to an agreement under §1833(a)(1)(A) of the Federal Social Security Act (42 USC §§1395, et seq.)

(20) [(48)] Point-of-service--A benefit option as defined in 42 C.F.R. §422.2.

(21) Pre-Standardized Medicare supplement benefit plan, Pre-Standardized benefit plan or Pre-Standardized plan--A group or individual policy of Medicare supplement insurance issued or issued for delivery prior to March 1, 1992.

(22) [(19)] Provider-Sponsored organization--An entity as defined in 42 U.S.C. §1395w-25(d)(1).

(23) [(20)] Qualified actuary--An actuary who is a member of either the Society of Actuaries or the American Academy of Actuaries.

(24) [(21)] Secretary--The Secretary of the United States Department of Health and Human Services.

§3.3306. Minimum Benefit Standards.

(a) Benefit Standards for 2010 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued or Issued for Delivery with an Effective Date for Coverage on or After June 1, 2010. This section specifies the minimum standards applicable to all Medicare supplement policies or certificates issued or issued for delivery in this state with an effective date for coverage on or after June 1, 2010. No insurance policy, subscriber contract, certificate, or evidence of coverage may be advertised, solicited, or issued for delivery in this state as a Medicare supplement policy unless the policy, contract, certificate, or evidence of coverage meets the applicable standards in paragraphs (1) - (3) of this subsection. No issuer may offer or issue any 1990 Standardized Medicare supplement benefit plan for sale on or after June 1, 2010. Benefit standards applicable to Medicare supplement policies and certificates issued or issued for delivery with an effective date prior to June 1, 2010, remain subject to the requirements of subsections (c) and (d) of this section. These are minimum standards and do not preclude the inclusion of other provisions or benefits which are not inconsistent with these standards.

(1) General standards. The following standards apply to Medicare supplement policies and certificates and are in addition to all other requirements of this subchapter, the Insurance Code Chapter 1652, and any other applicable law.

(A) A Medicare supplement policy or certificate shall not exclude or limit benefits for losses incurred more than six months from the effective date of coverage because it involved a preexisting condition. The policy or certificate may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the effective date of coverage.

(i) If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate, the replacing issuer shall waive any time periods applicable to preexisting condition waiting periods, elimination periods, and probationary periods in the new Medicare supplement policy or certificate to the extent such time was spent under the original policy.

(ii) If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate which has been in effect for at least six months, the replacing policy or certificate shall not provide any time period applicable to preexisting conditions, waiting periods, elimination periods and probationary periods for benefits.

(iii) If a Medicare supplement policy or certificate is issued or issued for delivery to an applicant who qualifies under §3.3312(b) of this subchapter (relating to Guaranteed Issue for Eligible Persons) or §3.3324(a) of this subchapter (relating to Open Enrollment), the issuer shall reduce the period of any preexisting condition exclusion as required by §3.3312(a)(2) of this subchapter and §3.3324(c) and (d) of this subchapter.

(B) A Medicare supplement policy or certificate shall not indemnify against losses resulting from sickness on a different basis than losses resulting from accidents.

(C) A Medicare supplement policy or certificate shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to coincide with any changes in the applicable Medicare deductible, copayment, or coinsurance amounts. Premiums may be modified to correspond with such changes.

(D) No Medicare supplement policy or certificate shall provide for termination of coverage of a spouse solely because of the occurrence of an event specified for termination of coverage of the insured, other than the nonpayment of premium, or be cancelled or non-renewed by the insurer solely on the grounds of deterioration of health.

(E) Each Medicare supplement policy shall be guaranteed renewable and shall comply with the provisions of clauses (i) - (v) of this subparagraph.

(i) The issuer shall not cancel or nonrenew the policy solely on the ground of health status of the individual.

(ii) The issuer shall not cancel or nonrenew the policy for any reason other than nonpayment of premium or material misrepresentation.

(iii) If the Medicare supplement policy is terminated by the group policyholder and is not replaced as provided in clause (iv) of this subparagraph, the issuer shall offer certificate holders an individual Medicare supplement policy which at the option of the certificate holder:

(I) provides for continuation of the benefits contained in the group policy; or

(II) provides for benefits that otherwise meet the requirements of this subparagraph.

(iv) If an individual is a certificate holder in a group Medicare supplement policy and the individual terminates membership in the group, the issuer shall:

(I) offer the certificate holder the conversion opportunity described in clause (iii) of this subparagraph; or

(II) at the option of the group policyholder, offer the certificate holder continuation of coverage under the group policy.

(v) If a group Medicare supplement policy is replaced by another group Medicare supplement policy purchased by the same policyholder, the issuer of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of termination. Coverage under the new policy shall not result in any exclusion for preexisting conditions that would have been covered under the group policy being replaced.

(F) Termination of a Medicare supplement policy or certificate shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be conditioned upon the continuous total disability of the insured, limited to the duration of the policy benefit period, if any, or payment of the maximum benefits. Receipt of Medicare Part D benefits must not be considered in determining a continuous loss.

(G) A Medicare supplement policy or certificate shall comply with clauses (i) - (iv) of this subparagraph:

(i) A Medicare supplement policy or certificate shall provide that benefits and premiums under the policy or certificate shall be suspended at the request of the policyholder or certificate holder for the period not to exceed 24 months in which the policyholder or certificate holder has applied for and is determined to be entitled to medical assistance under Title XIX of the Social Security Act, but only if the

policyholder or certificate holder notifies the issuer of the policy or certificate within 90 days after the date the individual becomes entitled to assistance.

(ii) If suspension occurs and if the policyholder or certificate holder loses entitlement to medical assistance, the policy or certificate shall be automatically reinstated effective as of the date of termination of entitlement if the policyholder or certificate holder provides notice of loss of entitlement within 90 days after the date of loss and pays the premium attributable to the period, effective as of the date of termination of entitlement.

(iii) Each Medicare supplement policy shall provide that benefits and premiums under the policy shall be suspended (for any period that may be provided by federal regulation) at the request of the policyholder or certificate holder if the policyholder or certificate holder is entitled to benefits under Section 226(b) of the Social Security Act and is covered under a group health plan (as defined in Section 1862(b)(1)(A)(v) of the Social Security Act). If suspension occurs and if the policyholder or certificate holder loses coverage under the group health plan, the policy shall be automatically reinstated, effective as of the date of loss of coverage, if the policyholder or certificate holder provides notice of loss of coverage within 90 days after the date of the loss.

(iv) Reinstitution of coverages shall comply with subclauses (I) - (III) of this clause.

(I) Reinstitution of coverage shall not provide for any waiting period with respect to treatment of preexisting conditions.

(II) Reinstitution of coverage shall provide for resumption of coverage that is substantially equivalent to coverage in effect before the date of suspension.

(III) Reinstitution of coverage shall provide for classification of premiums on terms at least as favorable to the policyholder or certificate holder as the premium classification terms that would have applied to the policyholder or certificate holder had the coverage not been suspended.

(2) Standards for Basic (Core) Benefits Common to Medicare Supplement Insurance Benefit Plans A, B, C, D, F, F with High Deductible, G, M and N. Every issuer of Medicare supplement insurance benefit plans shall make available a policy or certificate including only the following basic "core" package of benefits to each prospective insured. An issuer may make available to prospective insureds any of the other Medicare Supplement Insurance Benefit Plans in addition to the basic core package, but not in lieu of it. These plans include:

(A) coverage of Part A Medicare eligible expenses for hospitalization to the extent not covered by Medicare from the 61st day through the 90th day in any Medicare benefit period;

(B) coverage of Part A Medicare eligible expenses incurred for hospitalization to the extent not covered by Medicare for each Medicare lifetime inpatient reserve day used;

(C) upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of 100 percent of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system (PPS) rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;

(D) coverage under Medicare Parts A and B for the reasonable cost of the first three pints of blood or equivalent quantities of packed red blood cells, as defined under federal regulations, unless replaced in accordance with federal regulations;

(E) coverage for the coinsurance amount, or in the case of hospital outpatient department services paid under a prospective payment system, the copayment amount, of Medicare eligible expenses under Part B regardless of hospital confinement, subject to the Medicare Part B deductible;

(F) coverage of cost sharing for all Part A Medicare eligible hospice care and respite care expenses.

(3) Standards for Additional Benefits. The following additional benefits shall be included in Medicare supplement benefit Plans B, C, D, F, F with High Deductible, G, M, and N as provided by subsection (b) of this section.

(A) Medicare Part A Deductible:

(i) coverage for 100 percent of the Medicare Part A inpatient hospital deductible amount per benefit period; or

(ii) coverage for 50 percent of the Medicare Part A inpatient hospital deductible amount per benefit period.

(B) Skilled Nursing Facility Care: coverage for the actual billed charges up to the coinsurance amount from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A.

(C) Medicare Part B Deductible: coverage for 100 percent of the Medicare Part B deductible amount per calendar year regardless of hospital confinement.

(D) One Hundred Percent of the Medicare Part B Excess Charges: coverage for all of the difference between the actual Medicare Part B charges as billed, not to exceed any charge limitation established by the Medicare program or state law, and the Medicare-approved Part B charge.

(E) Medically Necessary Emergency Care in a Foreign Country: coverage to the extent not covered by Medicare for 80 percent of the billed charges for Medicare-eligible expenses for medically necessary emergency hospital, physician and medical care received in a foreign country, which care would have been covered by Medicare if provided in the United States and which care began during the first 60 consecutive days of each trip outside the United States, subject to a calendar year deductible of \$250, and a lifetime maximum benefit of \$50,000. For purposes of this benefit, "emergency care" shall mean care needed immediately because of an injury or an illness of sudden and unexpected onset.

(b) Standard Medicare Supplement Benefit Plans for 2010 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued or Issued for Delivery with an Effective Date for Coverage on or After June 1, 2010. The following standards are applicable to all Medicare supplement policies or certificates issued or issued for delivery in this state with an effective date for coverage on or after June 1, 2010. No insurance policy, subscriber contract, certificate, or evidence of coverage may be advertised, solicited, or issued for delivery in this state as a Medicare supplement policy unless the policy, contract, certificate, or evidence of coverage complies with these benefit plan standards. Benefit plan standards applicable to Medicare supplement policies and certificates issued or issued for delivery with an effective date for coverage before June 1, 2010, remain subject to the requirements of subsections (c) and (d) of this section.

(1) An issuer of a Medicare supplement policy or certificate shall comply with subparagraphs (A) and (B) of this paragraph:

(A) An issuer shall make available to each prospective policyholder and certificate holder a policy form or certificate form

containing only the basic (core) benefits, as defined in subsection (a)(2) of this section.

(B) If an issuer makes available any of the additional benefits described in subsection (a)(3) of this section, or offers standardized benefit Plans K or L (as described in paragraph (5)(H) and (I) of this subsection), then the issuer shall make available to each prospective policyholder and certificate holder, in addition to a policy form or certificate form with only the basic (core) benefits as described in subparagraph (A) of this paragraph, a policy form or certificate form containing either standardized benefit Plan C (as described in paragraph (5)(C) of this subsection) or standardized benefit Plan F (as described in paragraph (5)(E) of this subsection).

(2) No groups, packages or combinations of Medicare supplement benefits other than those listed in this subsection shall be offered for sale in this state, except as may be permitted in paragraph (6) of this subsection and in §3.3325 of this subchapter (relating to Medicare Select Policies, Certificates and Plans of Operation).

(3) Benefit plans shall be uniform in structure, language, and format, as well as designation, to the standard benefit plans listed in this paragraph and conform to the definitions in §3.3303 of this subchapter (relating to Definitions). Each benefit plan shall be structured in accordance with the format provided in subsection (a)(2) and (3) of this section; or, in the case of Plan K or L, in accordance with the format provided in paragraph (5)(H) or (I) of this subsection; and list the benefits in the order shown. For purposes of this subsection, "structure, language, and format" means style, arrangement and overall content of a benefit.

(4) In addition to the benefit plan designations required in paragraph (3) of this subsection, an issuer may use other designations to the extent permitted by law.

(5) The make-up of 2010 Standardized Benefit Plans is as specified in subparagraphs (A) - (K) of this paragraph.

(A) Standardized Medicare supplement benefit Plan A shall include only the following: The basic (core) benefits as defined in subsection (a)(2) of this section.

(B) Standardized Medicare supplement benefit Plan B shall include only the following: The basic (core) benefits as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible as defined in subsection (a)(3)(A) of this section.

(C) Standardized Medicare supplement benefit Plan C shall include only the following: The basic (core) benefits as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible, skilled nursing facility care, 100 percent of the Medicare Part B deductible, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A), (B), (C), and (E) of this section, respectively.

(D) Standardized Medicare supplement benefit Plan D shall include only the following: The basic (core) benefits (as defined in subsection (a)(2) of this section), plus 100 percent of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A), (B), and (E) of this section, respectively.

(E) Standardized Medicare supplement (regular) Plan F shall include only the following: The basic (core) benefits as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible, the skilled nursing facility care, 100 percent of the Medicare Part B deductible, 100 percent of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country

as defined in subsection (a)(3)(A), (B), (C), (D), and (E) of this section, respectively.

(F) Standardized Medicare supplement Plan F With High Deductible shall include 100 percent of covered expenses following the payment of the annual deductible set forth in clause (ii) of this subparagraph.

(i) The basic (core) benefits as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible, skilled nursing facility care, 100 percent of the Medicare Part B deductible, 100 percent of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A), (B), (C), (D), and (E) of this section, respectively.

(ii) The annual deductible in Plan F With High Deductible shall consist of out-of-pocket expenses, other than premiums, for services covered by regular Plan F, and shall be in addition to any other specific benefit deductibles. The basis for the deductible shall be \$1,500 and shall be adjusted annually by the Secretary of the U.S. Department of Health and Human Services to reflect the change in the Consumer Price Index for all urban consumers for the 12-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10.

(G) Standardized Medicare supplement benefit Plan G shall include only the following: The basic (core) benefits as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible, skilled nursing facility care, 100 percent of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A), (B), (D), and (E), respectively.

(H) Standardized Medicare supplement Plan K is mandated by the Medicare Prescription Drug, Improvement and Modernization Act of 2003, and shall include only the following:

(i) Part A Hospital Coinsurance, 61st through 90th days: Coverage of 100 percent of the Part A hospital coinsurance amount for each day used from the 61st through the 90th day in any Medicare benefit period;

(ii) Part A Hospital Coinsurance, 91st through 150th days: Coverage of 100 percent of the Part A hospital coinsurance amount for each Medicare lifetime inpatient reserve day used from the 91st through the 150th day in any Medicare benefit period;

(iii) Part A Hospitalization After 150 Days: Upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of 100 percent of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system (PPS) rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;

(iv) Medicare Part A Deductible: Coverage for 50 percent of the Medicare Part A inpatient hospital deductible amount per benefit period until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(v) Skilled Nursing Facility Care: Coverage for 50 percent of the coinsurance amount for each day used from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(vi) Hospice Care: Coverage for 50 percent of cost sharing for all Part A Medicare eligible expenses and respite care until

the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(vii) Blood: Coverage for 50 percent, under Medicare Part A or B, of the reasonable cost of the first three pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(viii) Part B Cost Sharing: Except for coverage provided in clause (ix) of this subparagraph, coverage for 50 percent of the cost sharing otherwise applicable under Medicare Part B after the policyholder pays the Part B deductible until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(ix) Part B Preventive Services: Coverage of 100 percent of the cost sharing for Medicare Part B preventive services after the policyholder pays the Part B deductible; and

(x) Cost Sharing After Out-of-Pocket Limits: Coverage of 100 percent of all cost sharing under Medicare Parts A and B for the balance of the calendar year after the individual has reached the out-of-pocket limitation on annual expenditures under Medicare Parts A and B of \$4000 in 2006, indexed each year by the appropriate inflation adjustment specified by the Secretary of the U.S. Department of Health and Human Services.

(I) Standardized Medicare supplement Plan L is mandated by The Medicare Prescription Drug, Improvement and Modernization Act of 2003, and shall include only the following:

(i) the benefits described in subparagraph (H)(i), (ii), (iii), and (ix) of this paragraph;

(ii) the benefit described in subparagraph (H)(iv), (v), (vi), (vii), and (viii) of this paragraph, but substituting 75 percent for 50 percent; and

(iii) the benefit described in subparagraph (H)(x) of this paragraph, but substituting \$2000 for \$4000.

(J) Standardized Medicare supplement Plan M shall include only the following: The basic (core) benefit as defined in subsection (a)(2) of this section, plus 50 percent of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A)(ii), (B), and (E) of this section, respectively.

(K) Standardized Medicare supplement Plan N shall include only the following: The basic (core) benefit as defined in subsection (a)(2) of this section, plus 100 percent of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in a foreign country as defined in subsection (a)(3)(A)(i), (B), and (E) of this section, respectively, with copayments in the following amounts:

(i) the lesser of \$20 or the Medicare Part B coinsurance or copayment for each covered health care provider office visit (including visits to medical specialists); and

(ii) the lesser of \$50 or the Medicare Part B coinsurance or copayment for each covered emergency room visit; however, this copayment shall be waived if the insured is admitted to any hospital and the emergency visit is subsequently covered as a Medicare Part A expense.

(6) An issuer may, with the prior approval of the commissioner, offer policies or certificates with new or innovative benefits, in addition to the standardized benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new

or innovative benefits shall include only benefits that are appropriate to Medicare supplement insurance, are new or innovative, are not otherwise available, and are cost-effective. Approval of new or innovative benefits must not adversely impact the goal of Medicare supplement simplification. New or innovative benefits shall not include an outpatient prescription drug benefit. New or innovative benefits shall not be used to change or reduce benefits, including a change of any cost-sharing provision, in any standardized plan.

(c) Benefit Standards for 1990 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued or Issued for Delivery on or After March 1, 1992, and with an Effective Date for Coverage Prior to June 1, 2010. No insurance policy, subscriber contract, certificate, or evidence of coverage may be advertised, solicited, or issued for delivery in this state as a Medicare supplement policy unless the policy, contract, certificate, or evidence of coverage meets the applicable standards in paragraphs (1) - (3) of this subsection [section]. These are minimum standards and do not preclude the inclusion of other provisions or benefits which are not inconsistent with these standards.

(1) General standards. The following standards apply to Medicare supplement policies and are in addition to all other requirements of this subchapter, the Insurance Code Chapter 1652[~~Article~~ 3-74], and any other applicable law.

(A) A Medicare supplement policy shall not exclude or limit benefits for losses incurred more than six months from the effective date of coverage because they involved a preexisting condition. The policy or certificate may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the effective date of coverage.

(i) If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate, the replacing issuer shall waive any time periods applicable to preexisting condition waiting periods, elimination periods, and probationary periods in the new Medicare supplement policy or certificate to the extent such time was spent under the original policy.

(ii) If a Medicare supplement policy or certificate replaces another Medicare supplement policy or certificate which has been in effect for at least six months, the replacing policy or certificate shall not provide any time period applicable to preexisting conditions, waiting periods, elimination periods and probationary periods for benefits.

(iii) If a Medicare supplement policy or certificate is issued or issued for delivery to an applicant who qualifies under §3.3312(b) of this subchapter [title (relating to Guaranteed Issue for Eligible Persons)] or §3.3324(a) of this subchapter [title (relating to Open Enrollment)], the issuer shall reduce the period of any preexisting condition exclusion as required by §3.3312(a)(2) of this subchapter [title] and §3.3324(c) and (d) of this subchapter [title].

(B) A Medicare supplement policy may not indemnify against losses resulting from sickness on a different basis than losses resulting from accidents.

(C) A Medicare supplement policy shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to coincide with any changes in the applicable Medicare deductible amount and copayment percentage factors. Premiums may be modified to correspond with such changes.

(D) No Medicare supplement policy shall provide for termination of coverage of a spouse solely because of the occurrence of an event specified for termination of coverage of the insured, other

than the nonpayment of premium, or be cancelled or nonrenewed by the insurer solely on the grounds of deterioration of health.

(E) Each Medicare supplement policy shall be guaranteed renewable and shall comply with the provisions of clauses (i) - (v) of this subparagraph.

(i) The issuer shall not cancel or nonrenew the policy for any reason other than nonpayment of premium or material misrepresentation.

(ii) If the Medicare supplement policy is terminated by the group policyholder and is not replaced as provided in clause (iv) of this subparagraph, the issuer shall offer certificate holders Medicare supplement coverage which provides benefits as set out in subclause (I) or (II) of this clause, as follow:

(I) an individual Medicare supplement policy which (at the option of the certificate holder):

(-a-) provides for continuation of the benefits contained in the group policy; or

(-b-) provides for benefits that otherwise meet the requirement of this paragraph; or

(II) continuation of benefits under the group plan until there are no longer any certificate holders remaining who have opted for continuation of benefits under the group policy terminated by the policyholder.

(iii) If an individual is a certificate holder in a group Medicare supplement policy and the individual terminates membership in the group, the issuer shall:

(I) offer the certificate holder conversion opportunity described in clause (ii) of this subparagraph; or

(II) at the option of the group policyholder, offer the certificate holder continuation of coverage under the group policy.

(iv) If a group Medicare supplement policy is replaced by another group Medicare supplement policy purchased by the same policyholder, the issuer of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of termination. Coverage under the new policy shall not result in any exclusion of preexisting conditions that would have been covered under the group policy being replaced.

(v) If a Medicare supplement policy eliminates an outpatient prescription drug benefit as a result of requirements imposed by the MMA, the modified policy shall be deemed to satisfy the guaranteed renewal requirements of this paragraph.

(F) Termination of a Medicare supplement policy shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be predicated upon the continuous total disability of the insured, limited to the duration of the policy benefit period, if any, or payment of the maximum benefits. Receipt of Medicare Part D benefits will not be considered in determining a continuous loss.

(G) A Medicare supplement policy or certificate shall provide that benefits and premiums under the policy or certificate shall be suspended at the request of the policyholder or certificate holder for the period (not to exceed 24 months) in which the policyholder or certificate holder has applied for and is determined to be entitled to medical assistance under Title XIX of the Social Security Act, but only if the policyholder or certificate holder notifies the issuer of such policy or certificate within 90 days after the date the individual becomes entitled to such assistance.

(i) If suspension occurs and if the policyholder or certificate holder loses entitlement to medical assistance, the policy or certificate shall be automatically reinstituted (effective as of the date of termination of entitlement) as of the termination of entitlement if the policyholder or certificate holder provides notice of loss of entitlement within 90 days after the date of loss and pays the premium attributable to the period, effective as of the date of termination of entitlement.

(ii) Each Medicare supplement policy or certificate shall provide that benefits and premiums under the policy or certificate shall be suspended (for any period that may be provided by federal regulation) at the request of the policyholder or certificate holder if the policyholder or certificate holder is entitled to benefits under Section [section] 226(b) of the Social Security Act and is covered under a group health plan (as defined in Section [section] 1862(b)(1)(A)(v) of the Social Security Act). If suspension occurs and if the policyholder or certificate holder loses coverage under the group health plan, the policy or certificate shall be automatically reinstated (effective as of the date of loss of coverage) if the policyholder or certificate holder provides notice of loss of coverage within 90 days after the date of such loss and pays the premium attributable to the period, effective as of the date of termination of entitlement.

(iii) Reinstitution of such coverages shall provide for the following:

(I) waiver of any waiting period with respect to treatment of preexisting conditions;

(II) resumption of coverage which is substantially equivalent to coverage in effect before the date of such suspension. If the suspended Medicare supplement policy provided coverage for outpatient prescription drugs, reinstatement of the policy for Medicare Part D enrollees shall be without coverage for outpatient prescription drugs and shall otherwise provide substantially equivalent coverage to the coverage in effect before the date of the suspension; and

(III) classification of premiums on terms at least as favorable to the policyholder or certificate holder as the premium classification terms that would have applied to the policyholder or certificate holder had the coverage not been suspended.

(H) If a Medicare supplement policy eliminates an outpatient prescription drug benefit as a result of requirements imposed by the MMA, the modified policy shall be deemed to satisfy the guaranteed renewal requirements of this paragraph.

(2) Standards for the basic (core) benefits common to benefit plans A - J. Every issuer shall make available a policy or certificate including only the basic "core" package of benefits described in subparagraphs (A) - (E) of this paragraph to each prospective insured. An issuer may make available to prospective insureds any of the other Medicare supplement insurance benefit plans in addition to the basic core package, but not in lieu of it. The basic core benefits shall consist of the following:

(A) coverage for Part A Medicare eligible expenses for hospitalization to the extent not covered by Medicare from the 61st day through the 90th day in any Medicare benefit period;

(B) coverage for Part A Medicare eligible expenses, to the extent not covered by Medicare, incurred as daily hospital charges during use of Medicare lifetime hospital inpatient reserve days;

(C) upon exhaustion of all Medicare hospital inpatient coverage including the lifetime reserve days, coverage of 100% of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system rate, or other appropriate Medicare

standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;

(D) coverage under Medicare Parts A and B for the reasonable cost of the first three pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulation) unless replaced in accordance with federal regulation; and

(E) coverage for the coinsurance amount (or in the case of hospital outpatient department services paid under a prospective payment system, the copayment amount) of Medicare eligible expenses under Part B regardless of hospital confinement, subject to the Medicare Part B deductible.

(3) Standards for Additional Benefits. The additional benefits as uniformly defined in subparagraphs (A) - (J) [~~(K)~~] of this paragraph and in subsection (d)(2)(O) of this section shall be included in Medicare Supplement Benefit Plans "B" through "J" only as provided in subsection (d)(2)(A) - (I) [~~paragraph (5)(A) - (H)~~] of this section.

(A) Medicare Part A Deductible--Coverage for all of the Medicare Part A inpatient hospital deductible amount per benefit period.

(B) Skilled Nursing Facility Care--Coverage for the actual billed charges up to the coinsurance amount from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A.

(C) Medicare Part B Deductible--Coverage for all of the Medicare Part B deductible amount per calendar year regardless of hospital confinement.

(D) Eighty Percent of the Medicare Part B Excess Charges--Coverage for 80% of the difference between the actual Medicare Part B charge as billed and the Medicare-approved Part B charge, not to exceed any charge limitation established by the Medicare program or state law.

(E) One Hundred Percent of the Medicare Part B Excess Charges--Coverage for all of the difference between the actual Medicare Part B charge as billed and the Medicare-approved Part B charge, not to exceed any charge limitation established by the Medicare program or state law.

(F) Basic Outpatient Prescription Drug Benefit--Coverage for 50% of outpatient prescription drug charges, after a \$250 calendar year deductible, to a maximum of \$1,250 in benefits received by the insured per calendar year, to the extent not covered by Medicare. The outpatient prescription drug benefit may be included for sale or issuance in a Medicare supplement policy until January 1, 2006.

(G) Extended Outpatient Prescription Drug Benefit--Coverage for 50% of outpatient prescription drug charges, after a \$250 calendar year deductible to a maximum of \$3,000 in benefits received by the insured per calendar year, to the extent not covered by Medicare. The outpatient prescription drug benefit may be included for sale or issuance in a Medicare supplement policy until January 1, 2006.

(H) Medically Necessary Emergency Care in a Foreign Country--Coverage to the extent not covered by Medicare for 80% of the billed charges for Medicare-eligible expenses for medically necessary emergency hospital, physician, and medical care received in a foreign country, which care would have been covered by Medicare if provided in the United States and which care began during the first 60 consecutive days of each trip outside the United States, subject to a calendar year deductible of \$250, and a lifetime maximum benefit of \$50,000. For purposes of this benefit, "emergency care" shall mean

care needed immediately because of an injury or an illness of sudden and unexpected onset.

(I) Preventive Medical Care Benefit or Services--Coverage for the preventive health services described in clauses (i) and (ii) of this subparagraph. Coverage for preventive medical care benefits or services shall be for the actual charges up to 100% of the Medicare-approved amount for each service, as if Medicare were to cover the service as identified in American Medical Association Current Procedural Terminology (AMA CPT) codes, to a maximum of \$120 annually under this benefit. This benefit shall not include payment for any procedure covered by Medicare:

(i) an annual clinical preventive medical history and physical examination that may include tests and services from clause (ii) of this subparagraph and patient education to address preventive health care measures;

(ii) preventive screening tests or preventive services, the selection and frequency of which are determined to be medically appropriate by the attending physician.

(J) At-Home Recovery Benefit--Coverage for services to provide short-term, at-home assistance with activities of daily living for those recovering from an illness, injury, or surgery.

(i) For purposes of this benefit, the following definitions in subclauses (I) - (IV) of this clause shall apply.

(I) Activities of daily living include, but are not limited to, bathing, dressing, personal hygiene, transferring, eating, ambulating, assistance with drugs that are normally self-administered, and changing bandages or other dressings.

(II) Care provider means a duly qualified or licensed home health aide or homemaker, personal care aide, or nurse provided through a licensed home health care agency or referred by a licensed referral agency or licensed nurses registry.

(III) Home shall mean any place used by the insured as a place of residence, provided that such place would qualify as a residence for home health care services covered by Medicare. A hospital or skilled nursing facility shall not be considered the insured's place of residence.

(IV) At-home recovery visit means the period of a visit required to provide at-home recovery care, without limit on the duration of the visit, except each consecutive four hours in a 24-hour period of services provided by a care provider is one visit.

(ii) Coverage requirements and limitations.

(I) At-home recovery services provided must be primarily services which assist in activities of daily living.

(II) The insured's attending physician must certify that the specific type and frequency of at-home recovery services are necessary because of a condition for which a home care plan of treatment was approved by Medicare.

(III) Coverage is limited to:

(-a-) no more than the number and type of at-home recovery visits certified as necessary by the insured's attending physician. The total number of at-home recovery visits shall not exceed the number of Medicare approved home health care visits under a Medicare approved home care plan of treatment;

(-b-) the actual charges for each visit up to maximum coverage of \$40 per visit;

(-c-) \$1,600 per calendar year;

(-d-) seven visits in any one week;

(-e-) care furnished on a visiting basis in the insured's home;

(-f-) services provided by a care provider as defined in this section;

(-g-) at-home recovery visits while the insured is covered under the policy or certificate and not otherwise excluded;

(-h-) at-home recovery visits received during the period the insured is receiving Medicare approved home care services or no more than eight weeks after the service date of the last Medicare approved home health care visit.

(iii) Coverage is excluded for:

(I) home care visits paid for by Medicare or other government programs; and

(II) care provided by family members, unpaid volunteers, or providers who are not care providers.

~~[(K) New or Innovative Benefits.--Any benefit which an issuer may, with the prior approval of the commissioner, offer in addition to the benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits may include benefits that are appropriate to Medicare supplement insurance, new or innovative, not otherwise available, cost-effective, and offered in a manner which is consistent with the goal of simplification of Medicare supplement policies. After December 31, 2005, the innovative benefit shall not include an outpatient prescription drug benefit.]~~

(d) Standard Medicare Supplement Benefit Plans for 1990 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued or Issued for Delivery on or After March 1, 1992 and with an Effective Date for Coverage Prior to June 1, 2010.

(1) ~~[(4)]~~ Requirement of uniformity for all Medicare supplement benefit plans. An issuer shall make available only those groups, packages or combinations of Medicare supplement benefits as described in this section, unless otherwise permitted by provisions of paragraph ~~(2)(O)~~ ~~[(3)(K)]~~ of this subsection ~~[section]~~ and in §3.3325 of this subchapter ~~[title (relating to Medicare Select Policies, Certificates and Plans of Operation)]~~. Benefit plans shall be uniform in structure, language, designation and format to the standard benefit plan "A," defined as the basic core plan of benefits in subsection ~~(c)(2)~~ ~~[paragraph (2)]~~ of this section and described in paragraph ~~(2)(A)~~ ~~[(5)(A)]~~ of this subsection ~~[section]~~, and benefit plans "B" through "J," described in paragraph ~~(2)(B) - (L)~~ ~~[(5)(B) - (L)]~~ of this subsection ~~[section]~~. All benefit plans shall conform to the definitions set out in §3.3303 of this subchapter ~~[title (relating to Definitions)]~~ and §3.3304 of this subchapter ~~[title (relating to Policy Definitions and Terms)]~~. Each benefit shall be structured in accordance with the format provided in subsection (c)(2) and (3) ~~[paragraphs (2) and (3)]~~ of this section. Each benefit plan shall list the benefits in the order shown in paragraph ~~(2)(A) - (L)~~ ~~[(5)(A) - (L)]~~ of this subsection ~~[section]~~. For purposes of this paragraph, "structure, language, and format" means style, arrangement and overall content of a benefit. In addition to the benefit plan designations required in this paragraph, an issuer may use other designations to the extent permitted by law.

(2) ~~[(5)]~~ Make-up of Benefit Plans. Subparagraphs ~~(A) - (O)~~ ~~[(N)]~~ of this paragraph set out the composition of benefit plans. Each benefit plan shall meet the requirements of this subchapter.

(A) Standardized Medicare Supplement Benefit Plan "A." Medicare supplement benefit Plan "A" shall include only the Core Benefits common to All Benefit Plans, as defined in subsection (c)(2) ~~[paragraph (2)]~~ of this section.

(B) Standardized Medicare Supplement Benefit Plan "B." Medicare supplement benefit Plan "B" shall include only the Core Benefits as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medicare Part B Deductible and Medically Necessary Emergency Care in a Foreign Country as defined in subsection (c)(3) [paragraph (3)] of this section.

(C) Standardized Medicare Supplement Benefit Plan "C." Medicare supplement benefit Plan "C" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medicare Part B Deductible and Medically Necessary Emergency Care in a Foreign Country as defined in subsection (c)(3) [paragraph (3)] of this section.

(D) Standardized Medicare Supplement Benefit Plan "D." Medicare supplement benefit Plan "D" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medically Necessary Emergency Care in a Foreign Country and the At-Home Recovery Benefit as defined in subsection (c)(3) [paragraph (3)] of this section.

(E) Standardized Medicare Supplement Benefit Plan "E." Medicare supplement benefit Plan "E" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medically Necessary Emergency Care in a Foreign Country and Preventive Medical Care as defined in subsection (c)(3) [paragraph (3)] of this section.

(F) Standardized Medicare Supplement Benefit Plan "F." Medicare supplement benefit Plan "F" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, the Skilled Nursing Facility Care, the Part B Deductible, One Hundred Percent of the Medicare Part B Excess Charges, and Medically Necessary Emergency Care in a Foreign Country as defined in subsection (c)(3) [paragraph (3)] of this section.

(G) Standardized Medicare Supplement Benefit High Deductible Plan "F." Medicare supplement benefit high deductible Plan "F" shall include only the following: 100% of covered expenses following the payment of the annual high deductible Plan "F" deductible. The covered expenses include the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medicare Part B Deductible, 100% of the Medicare Part B Excess Charges, and Medically Necessary Emergency Care in a Foreign Country as defined in subsection (c)(3) [paragraph (3)] of this section. The annual high deductible Plan "F" deductible shall consist of out-of-pocket expenses, other than premiums for services covered by the Medicare supplement Plan "F" policy, and shall be in addition to any other specific benefit deductibles. The annual high deductible Plan "F" deductible shall be \$1500 for 1998 and 1999, and shall be based on the calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10.

(H) Standardized Medicare Supplement Benefit Plan "G." Medicare supplement benefit Plan "G" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Eighty Percent of the Medicare Part B Excess Charges, Medically Necessary Emergency Care in a Foreign Country, and the At-Home Recovery Benefit as defined in subsection (c)(3) [paragraph (3)] of this section.

(I) Standardized Medicare Supplement Benefit Plan "H." Medicare supplement benefit Plan "H" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Basic Prescription Drug Benefit and Medically Necessary Emergency Care in a Foreign Country as defined in subsection (c)(3) [paragraph (3)] of this section. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.

(J) Standardized Medicare Supplement Benefit Plan "I." Medicare supplement benefit Plan "I" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, One Hundred Percent of the Medicare Part B Excess Charges, Basic Prescription Drug Benefit, Medically Necessary Emergency Care in a Foreign Country and At-Home Recovery Benefit as defined in subsection (c)(3) [paragraph (3)] of this section. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.

(K) Standardized Medicare Supplement Benefit Plan "J." Medicare supplement benefit Plan "J" shall include only the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medicare Part B Deductible, One Hundred Percent of the Medicare Part B Excess Charges, Extended Prescription Drug Benefit, Medically Necessary Emergency Care in a Foreign Country, Preventive Medical Care and At-Home Recovery Benefit as defined in subsection (c)(3) [paragraph (3)] of this section. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.

(L) Standardized Medicare Supplement Benefit High Deductible Plan "J." Medicare supplement benefit high deductible Plan "J" shall include only the following: 100% of covered expenses following the payment of the annual high deductible Plan "J" deductible. The covered expenses include the Core Benefit as defined in subsection (c)(2) [paragraph (2)] of this section, plus the Medicare Part A Deductible, Skilled Nursing Facility Care, Medicare Part B Deductible, 100% of the Medicare Part B Excess Charges, Extended Outpatient Prescription Drug Benefit, Medically Necessary Emergency Care in a Foreign Country, Preventive Medical Care and At-Home Recovery Benefit as defined in subsection (c)(3) [paragraph (3)] of this section. The annual high deductible Plan "J" deductible shall consist of out-of-pocket expenses, other than premiums for services covered by the Medicare supplement Plan "J" policy, and shall be in addition to any other specific benefit deductibles. The annual high deductible Plan "J" deductible shall be \$1500 for 1998 and 1999, and shall be based on the calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.

(M) Standardized Medicare supplement benefit Plan "K" shall include only the following:

(i) Coverage of 100% of the Part A hospital coinsurance amount for each day used from the 61st through the 90th day in any Medicare benefit period;

(ii) Coverage of 100% of the Part A hospital coinsurance amount for each Medicare lifetime inpatient reserve day used from the 91st through the 150th day in any Medicare benefit period;

(iii) Upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of 100% of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;

(iv) Medicare Part A Deductible: Coverage for 50% of the Medicare Part A inpatient hospital deductible amount per benefit period until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(v) Skilled Nursing Facility Care: Coverage for 50% of the coinsurance amount for each day used from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(vi) Hospice Care: Coverage for 50% of cost sharing for all Part A Medicare eligible expenses and respite care until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(vii) Coverage for 50%, under Medicare Part A or B, of the reasonable cost of the first three pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(viii) Except for coverage provided in clause (ix) of this subparagraph, coverage for 50% of the cost sharing otherwise applicable under Medicare Part B after the policyholder pays the Part B deductible until the out-of-pocket limitation is met as described in clause (x) of this subparagraph;

(ix) Coverage of 100% of the cost sharing for Medicare Part B preventive services after the policyholder pays the Part B deductible; and

(x) Coverage of 100% of all cost sharing under Medicare Parts A and B for the balance of the calendar year after the individual has reached the out-of-pocket limitation on annual expenditures under Medicare Parts A and B of \$4000 in calendar year 2006, indexed each year by the appropriate inflation adjustment specified by the Secretary.

(N) Standardized Medicare supplement benefit Plan "L" shall include only the following:

(i) The benefits described in subparagraph (M)(i), (ii), (iii) and (ix) of this paragraph;

(ii) The benefits described in subparagraph (M)(iv), (v), (vi), (vii) and (viii) of this paragraph, but substituting 75% for 50%; and

(iii) The benefit described in subparagraph (M)(x) of this paragraph, but substituting \$2000 for \$4000.

(O) Any benefit that an issuer may, with the prior approval of the commissioner, offer in addition to the benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits may include benefits that are appropriate to Medicare supplement insurance, new or innovative, not otherwise available, cost-effective, and offered in a manner which is consistent with the goal of simplification of Medicare supplement policies. After December 31, 2005, the innovative benefit shall not include an outpatient prescription drug benefit.

§3.3308. Required Disclosure Provisions.

(a) - (b) (No change.)

(c) Form for outline of coverage. In providing outlines of coverage to applicants pursuant to the requirements of subsection (b)(1) of this section, insurers shall use a form which complies with the requirements of this subsection. The outline of coverage must contain each of the following four parts in the following order: a cover page, premium information, disclosure pages, and charts displaying the features of each benefit plan offered by the issuer. The outline of coverage shall be in the language and format prescribed in paragraphs (1) and (2) of this subsection in no less than 12-point type.

(1) All plans [A-J] shall be shown on the cover page, and the plan(s) that are offered by the issuer shall be prominently identified. Premium information for plans that are offered shall be shown on the cover page or immediately following the cover page and shall be prominently displayed. The premium and mode shall be stated for all plans that are offered to the prospective applicant. All possible premiums for the prospective applicant shall be illustrated.

(2) The items in subparagraphs (A) - (C) of this paragraph shall be included in the outline of coverage in addition to the items specified in the plan-specific outline-of-coverage forms.

(A) Dollar amounts which are shown in parentheses for each of the plan-specific charts on the following pages are for the calendar year in which the charts were published [~~1992~~]. Issuers shall, for each plan offered, appropriately complete outline-of-coverage-chart statements about amounts to be paid by Medicare, the plan, and the covered person by replacing the amount in parentheses with the dollar amount corresponding to each covered service for the applicable calendar year benefit period.

(B) - (C) (No change.)

(D) The outline of coverage for Medicare Select policies or certificates shall include information regarding grievance procedures which meet the requirements of §3.3325(m) of this subchapter [~~title~~] (relating to Medicare Select Policies, Certificates and Plans of Operation).

[Figure: 28 TAC §3.3308(e)(2)(D)]

(E) The commissioner adopts by reference the Outline of Coverage form, Form No. LHL 050 Rev. 06/09, which contains a chart of benefits for each of the standard Medicare supplement plans and required disclosures. The form is available at www.tdi.state.tx.us/forms/form10other.html.

(F) The commissioner adopts by reference the Outline of Coverage form, Form No. LHL 050 Rev. 12/04, which contains a chart of benefits for each of the standard Medicare supplement plans and required disclosures. The form is available at www.tdi.state.tx.us/forms/form10other.html.

§3.3319. Standards for Marketing.

(a) - (b) (No change.)

(c) In addition to the practices prohibited in the Insurance Code Chapter 541[~~, Article 21.21~~], the following acts and practices are prohibited in the marketing of Medicare supplement policies or coverages in this state.

(1) - (3) (No change.)

(4) Issuers may utilize additional benefit designations in the marketing of the benefit plans; however, such designations shall be accompanied by a clear statement as to the applicable benefit plan[~~, "A" through "J,"~~] being marketed. Additional benefit designations shall not be deceptive or misleading.

§3.3322. Filing and Approval of Policies, Certificates and Premium Rates; Discontinuance of Forms.

(a) - (c) (No change.)

(d) Except as provided in paragraphs (1) - (4) ~~[and (2)]~~ of this subsection, an issuer shall not file for approval more than one form of a policy or certificate of each type for each standard Medicare supplement benefit plan. For the purposes of this section, a "type" means an individual policy, a group policy, an individual Medicare Select policy, or a group Medicare Select policy. An issuer may offer, with the approval of the commissioner, up to four [one additional] policy forms [form] or certificate forms [form] of the same type for the same standard Medicare supplement benefit plan, one for each of the following cases:

- (1) the inclusion of new or innovative benefits; ~~[and]~~
- (2) the addition of either direct response or agent marketing methods;
- (3) the addition of either guaranteed issue or underwritten coverage; and
- (4) ~~[(2)]~~ the offering of coverage to individuals eligible for Medicare by reason of disability.

(e) - (h) (No change.)

§3.3326. Prohibition Against Use of Genetic Information and Requests for Genetic Testing in Medicare Supplement Policies.

This section applies to all Medicare supplement policies and certificates with policy years beginning on or after May 21, 2009.

(1) The definitions in subparagraphs (A) - (F) of this paragraph apply to this section only.

(A) "Issuer of a Medicare supplement policy or certificate" includes a third-party administrator, or other person acting for or on behalf of such issuer.

(B) "Family member" means, with respect to an individual, any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual.

(C) "Genetic information" means, with respect to any individual, information about such individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual. Such term includes, with respect to any individual, any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual. Any reference to genetic information concerning an individual or family member of an individual who is a pregnant woman, includes genetic information of any fetus carried by such pregnant woman, or with respect to an individual or family member utilizing reproductive technology, includes genetic information of any embryo legally held by an individual or family member. The term "genetic information" does not include information about the sex or age of any individual.

(D) "Genetic services" means a genetic test, genetic counseling (including obtaining, interpreting, or assessing genetic information), or genetic education.

(E) "Genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detect genotypes, mutations, or chromosomal changes. The term "genetic test" does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes; or an analysis of proteins or metabolites that is directly related to a manifested disease, disorder,

or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

(F) "Underwriting purposes" means:

(i) rules for, or determination of, eligibility (including enrollment and continued eligibility) for benefits under the policy;

(ii) the computation of premium or contribution amounts under the policy;

(iii) the application of any pre-existing condition exclusion under the policy; and

(iv) other activities related to the issuance, renewal, or replacement of a contract of health insurance or health benefits.

(2) An issuer of a Medicare supplement policy or certificate must comply with subparagraphs (A) and (B) of this paragraph.

(A) The issuer shall not deny or condition the issuance or effectiveness of the policy or certificate including the imposition of any exclusion of benefits under the policy based on a pre-existing condition on the basis of the genetic information with respect to such individual; and

(B) The issuer shall not discriminate in the pricing of the policy or certificate, including the adjustment of premium rates, of an individual on the basis of the genetic information with respect to such individual.

(3) Nothing in paragraph (2) of this section shall be construed to limit the ability of an issuer, to the extent otherwise permitted by law, from:

(A) denying or conditioning the issuance or effectiveness of the policy or certificate or increasing the premium for a group based on the manifestation of a disease or disorder of an insured or applicant; or

(B) increasing the premium for any policy issued or issued for delivery to an individual based on the manifestation of a disease or disorder of an individual who is covered under the policy; in such case, the manifestation of a disease or disorder in one individual cannot also be used as genetic information about other group members and to further increase the premium for the group.

(4) An issuer of a Medicare supplement policy or certificate shall not request or require an individual or a family member of such individual to undergo a genetic test.

(5) Paragraph (4) of this section shall not be construed to preclude an issuer of a Medicare supplement policy or certificate from obtaining and using the results of a genetic test in making a determination regarding payment, as defined for the purposes of applying the regulations promulgated under Part C of Title XI and Section 264 of the Health Insurance Portability and Accountability Act of 1996, as may be revised from time to time. The payment must be consistent with paragraph (2) of this section.

(6) In implementing paragraph (5) of this section, an issuer of a Medicare supplement policy or certificate may request only the minimum amount of information necessary to accomplish the intended purpose.

(7) Notwithstanding paragraph (4) of this section, an issuer of a Medicare supplement policy may request, but not require, that an individual or a family member of such individual undergo a genetic test if each of the conditions specified in subparagraphs (A) - (E) of this paragraph is met:

(A) the request is made pursuant to research that complies with Part 46 of Title 45, Code of Federal Regulations, or equivalent federal regulations, and any applicable state or local law or regulations for the protection of human subjects in research;

(B) The issuer clearly indicates to each individual, or in the case of a minor child, to the legal guardian of such child, to whom the request is made that:

(i) compliance with the request is voluntary; and

(ii) non-compliance will have no effect on enrollment status or premium or contribution amounts;

(C) no genetic information collected or acquired under this subsection shall be used for underwriting, determination of eligibility to enroll or maintain enrollment status, premium rates, or the issuance, renewal, or replacement of a policy or certificate;

(D) the issuer notifies the commissioner in writing that the issuer is conducting activities pursuant to the exception provided for under this paragraph, including a description of the activities conducted; and

(E) the issuer complies with such other conditions as the commissioner may by rule require for activities conducted under this paragraph.

(8) An issuer of a Medicare supplement policy or certificate shall not request, require, or purchase genetic information for underwriting purposes.

(9) An issuer of a Medicare supplement policy or certificate shall not request, require, or purchase genetic information with respect to any individual prior to such individual's enrollment under the policy in connection with such enrollment.

(10) If an issuer of a Medicare supplement policy or certificate obtains genetic information incidental to the requesting, requiring, or purchasing of other information concerning any individual, such request, requirement, or purchase shall not be considered a violation of paragraph (9) of this section if such request, requirement, or purchase is not in violation of paragraph (8) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 3, 2009.

TRD-200901303

Brenda Caldwell

Assistant General Counsel

Texas Department of Insurance

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 463-6327



TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §71.29, §71.31

The Employees Retirement System of Texas (ERS) proposes amendments to 34 TAC §71.29 and §71.31 concerning creditable service towards retirement.

An experience study conducted by the ERS actuary for pension matters resulted in recommended changes to assumptions that were approved by the ERS Board of Trustees (Board) at the May 13, 2008 meeting. Actuarial tables and reduction factors were prepared using the new assumptions, and these tables and factors were approved by the Board at the February 24, 2009 meeting. These sections of the ERS rules are amended to update the rules for the various changes to actuarial tables and reduction factors relating to the experience study, that have been approved by the Board.

Section 71.29 and §71.31, concerning the purchase of additional service credit and credit purchase option for certain waiting period service, are being amended to reflect new assumptions based on the recent actuarial experience study, new actuarial tables and reduction factors calculated on these assumptions.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules would be simplified administration for the ERS defined benefit plans, to improve the accuracy of calculations and computations related to retirement benefits, and to make the rules conform to the Board's approved reduction factors and actuarial tables for retirement. There are no known anticipated costs to persons who are required to comply with the rules as proposed and, to her knowledge, small businesses should not be affected.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, May 18, 2009, at 10:00 a.m.

The amendments are proposed under the Texas Government Code §815.102 and §815.105 which provide authorization for the ERS Board of Trustees to adopt mortality, service and other tables necessary for the retirement system and to adopt rules for the retirement system.

No other statutes are affected by the proposed amendments.

§71.29. Purchase of Additional Service Credit.

(a) An eligible member may establish equivalent membership service credit authorized by §813.513, Texas Government Code, as provided in this section. The provisions of §71.14 of this title (relating to Payments To Establish or Reestablish Service Credit) do not apply to credit established under this section.

(b) A member is eligible to establish credit under this section in the membership class in which the member holds a position if the member:

(1) has 120 months of service credit for one or more periods of time during which the member held a position in a membership class and the required contributions were made;

(2) is actively contributing to the system at the time credit is established; and

(3) is not eligible to establish other credit or service.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the credit established under this section. The tables recommended by the actuaries and adopted by the board shall be used by the system to determine the actuarial present value. The additional service credit tables are adopted by reference and made a part of this rule for all purposes. The additional service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For service purchase calculations performed prior to September 1, 2009, the previously adopted tables apply. Copies of these tables are [Such tables are incorporated herein by reference and shall be] available from the System's executive director, Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207. The actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the actuaries and adopted by the board.

(d) Credit shall be established in increments of 12 months of credit, except that a member who may become eligible to retire by establishing fewer than 12 months of credit may establish the minimum number of months of credit necessary for the member to become eligible to retire.

(e) A member who establishes credit under this section shall certify that the member is not eligible to establish other credit or service and shall waive any and all right to establish such credit or service that the member had on the date of the deposit required by subsection (c) of this section. This subsection does not apply to service credit transferred as authorized by Chapter 805, Texas Government Code.

(f) Credit established under this section may not be used to compute the amount of a disability retirement annuity, or to determine average monthly compensation for the purpose of computing a service retirement annuity.

(g) A member who withdraws contributions and cancels credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit as provided in this section.

(h) The provisions of §813.503, Texas Government Code, do not apply to credit established under this section.

§71.31. Credit Purchase Option For Certain Waiting Period Service.

(a) An eligible member may establish service credit for service performed during the waiting period as authorized by §813.514, Texas Government Code, and as provided in this section. The provisions of §71.14 of this title (relating to Payments To Establish or Reestablish Service Credit) [chapter] do not apply to service credit established under this section.

(b) A member is eligible to establish service credit under this section if the member:

- (1) holds a position in the employee class;
- (2) has completed the waiting period;

(3) has made a retirement contribution in accordance with §813.201, Texas Government Code; and

(4) makes application for the establishment of service credit and payment of the required contributions in accordance with procedures developed by ERS.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the service credit established under this section. The tables recommended by the system's actuary and adopted by the board shall be used to determine the actuarial present value. The waiting period service credit tables are adopted by reference and made a part of this rule for all purposes. The waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For service purchase calculations performed prior to September 1, 2009, the previously adopted tables apply. Copies of these tables are available from the System's executive director, Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207. [-]
[Figure: 34 TAC §71.31(e)]

(d) Actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing service credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the system's actuary and adopted by the board.

(e) Waiting period service credit shall be established in increments of one month.

(f) This section does not apply to service credit transferred as authorized by Texas Government Code, Chapter 805.

(g) A member who withdraws contributions and cancels service credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit only as provided by this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901343

Paula A. Jones

General Counsel and Chief Compliance Officer
Employees Retirement System of Texas

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 867-7416



CHAPTER 73. BENEFITS

34 TAC §73.11, §73.21

The Employees Retirement System of Texas (ERS) proposes amendments to 34 TAC §73.11 and §73.21, concerning Benefits at Death or Retirement.

An experience study conducted by the ERS actuary for pension matters resulted in recommended changes to assumptions that were approved by the ERS Board of Trustees (Board) at the May 13, 2008 meeting. Actuarial tables and reduction factors were prepared using the new assumptions, and these tables and factors were approved by the Board at the February 24, 2009 meeting. These sections of the ERS rules are amended to update the rules for the various changes to actuarial tables and reduction factors relating to the experience study and that have been approved by the Board.

Section 73.11 and §73.21, concerning the Supplemental Retirement Program and the Reduction Factors for Age and Retirement Option, are being amended to reflect new assumptions based on the recent actuarial experience study and new actuarial tables and reduction factors calculated on those assumptions.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules would be simplified administration for the ERS defined benefit plans, to improve the accuracy of calculations and computations related to retirement benefits, and to make the rules conform to the Board's approved reduction factors and actuarial tables for retirement. There are no known anticipated costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, May 18, 2009, at 10:00 a.m.

The amendments are proposed under the Texas Government Code §815.102 and §815.105 which provide authorization for the ERS Board of Trustees to adopt mortality, service and other tables necessary for the retirement system and to adopt rules for the retirement system.

No other statutes are affected by the proposed amendments.

§73.11. Supplemental Retirement Program.

(a) For the purpose of this section:

(1) "supplemental program" is the program of retirement benefits for commissioned peace officers and custodial officers established by the Texas Government Code, §814.107;

(2) "regular program" is the retirement program available to members of the employee class generally.

(b) Age reduction factors for retirement from the supplemental program prior to age 50 are adopted by reference and are made a part of this rule for all purposes. Copies of the factors may be obtained from the executive director of the Employees Retirement System of Texas at 18th and [&] Brazos Streets; P.O. Box 13207; Austin, Texas 78711-3207. The reduction factors for retirement from the supplemental program prior to age 50 apply to retirements effective on or after September 30, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on

May 13, 2008. For retirements effective prior to September 30, 2009, the previously adopted factors apply.

(c) Option factors for annuities, based on a retirement involving the supplemental program, are those applicable to the age of the retiree and nominee at the time payments under each program are to begin.

(d) No payment shall be required to establish service credit in the supplemental program unless payment would be required to establish that credit in the regular program.

(e) Military service credit shall be creditable in the supplemental program only if, within 90 days of termination of covered employment, the member went into the military without intervening employment and the member resumed covered employment within 90 days of termination of military service.

(f) An occupational disability retirement annuity is subject to increase pursuant to the supplemental program as a result of the individual's submission of evidence satisfactory to the retirement system that the person's condition makes the person incapable of gainful occupation and is considered a total disability under the federal social security law.

(g) An annuity increase under subsection (f) of this section [Subsection (f)] is not payable before the first month following the month in which the satisfactory evidence under subsection (f) of this section [Subsection (f)] is received by the retirement system.

(h) An adjustment under the provisions of subsection (f) of this section shall include any reduction option factor applicable to a survivor benefit.

§73.21. Reduction Factor for Age and Retirement Option.

(a) Actuarial assumptions, mortality tables, and reduction factors used for calculation of benefits are those adopted by the board and apply to forms and effective dates of annuities specified by the board. Such assumptions, tables, and factors are incorporated in this rule by reference and are a part of this rule for all purposes. Copies of the tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(b) The 1999 reduction factors for optional forms of retirement annuities apply to retirements effective on or after September 30, 1999 and prior to September 30, 2009, and are those factors adopted by the board December 8, 1999, based on assumptions adopted by the board December 9, 1998. The factors apply to annuities first payable January 1, 2000 through August 31, 2009. The 2009 reduction factors for optional forms of retirement annuities apply to retirements effective on or after September 30, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2009 reduction factors apply to retirements first effective September 30, 2009, and thereafter. For retirements prior to September 30, 2009, the previously adopted factors apply.

(c) The actuaries have developed reduction factors for early retirement or death in accordance with the mortality tables adopted by the board. Such tables are incorporated in this rule by reference and are a part of this rule for all purposes. The reduction factors for early retirement or death apply to retirements effective on or after September 30, 2009, and apply to deaths first reported to ERS on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For retirements prior to September 30, 2009 and deaths first reported to ERS prior to September 1, 2009, the previously adopted factors apply.

(d) The 2000 reduction ~~[Reduction]~~ factors for the partial lump sum option apply to retirements effective on or after January 1, 2000 through August 31, 2009, and are those factors adopted by the board December 8, 1999, based on assumptions adopted by the board December 9, 1998. The 2009 reduction factors for the partial lump sum option apply to retirements effective on or after September 30, 2009 and deaths first reported to ERS prior to September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For retirements occurring prior to September 30, 2009 and deaths first reported to ERS prior to September 1, 2009, the previously adopted factors apply.

(e) The 2005 reduction ~~[Reduction]~~ factors for a standard nonoccupational disability retirement annuity apply to a disability retirement application received by the System on or after September 1, 2005, and are those factors adopted by the board on August 24, 2005, based on assumptions adopted by the board on December 10, 2003. The 2009 reduction factors for a standard nonoccupational disability retirement annuity apply to a disability retirement based on the effective date of a retirement that is first effective on or after September 30, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For disability retirements based on an effective date of retirement that is first effective prior to September 30, 2009, the previously adopted factors apply.
[Figure: 34 TAC §73.21(e)]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901344

Paula A. Jones

General Counsel and Chief Compliance Officer
Employees Retirement System of Texas

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 867-7416



CHAPTER 77. JUDICIAL RETIREMENT

34 TAC §§77.1, 77.11, 77.21

The Employees Retirement System of Texas (ERS) proposes amendments to 34 TAC §§77.1, 77.11 and 77.21, concerning Judicial Retirement.

An experience study conducted by the ERS actuary for pension matters resulted in recommended changes to assumptions that were approved by the ERS Board of Trustees (Board) at the May 13, 2008 meeting. Actuarial tables and reduction factors were prepared using the new assumptions, and these tables and factors were approved by the Board at the February 24, 2009 meeting. These sections of the ERS rules are amended to update the rules for the various changes to actuarial tables and reduction factors relating to the experience study and that have been approved by the Board.

Sections 77.1, 77.11 and 77.21, concerning Reduction Factors for Death before Age 65, Reduction Factors for Age and Retirement Options--Judicial Retirement System of Texas Plan One (JRS-I) and Judicial Retirement System of Texas Plan Two (JRS-II), and Purchase of Additional Service Credit, are being amended to reflect new assumptions based on the recent actu-

arial experience study and new actuarial tables and reduction factors calculated on those assumptions.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules would be simplified administration for the ERS defined benefit plans, to improve the accuracy of calculations and computations related to retirement benefits, and to make the rules conform to the Board's approved reduction factors, reserve factors, and actuarial tables for retirement. There are no known anticipated costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is Monday, May 18, 2009, at 10:00 a.m.

The amendments are proposed under the Texas Government Code §§835.002, 840.002, and 840.005 which provide authorization for the ERS Board of Trustees to adopt mortality, service and other tables and factors necessary for the retirement system and to adopt rules for the retirement system.

No other statutes are affected by the proposed amendments.

§77.1. Reduction Factors for Death before Age 65.

If a member of the Judicial Retirement System of Texas Plan One who is eligible to select a death benefit plan dies prior to age 65, the annuity will be reduced by the factors developed by the actuaries. Those factors are adopted by reference and are made a part of this section for all purposes. Copies of the factors may be obtained from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets; P.O. Box 13207, Austin, Texas 78711-3207. The reduction factors that apply to deaths of members prior to age 65 and that occur on or after September 1, 2009, are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For deaths occurring prior to September 1, 2009, the previously adopted factors apply.

§77.11. Reduction Factors for Age and Retirement Options--Judicial Retirement System of Texas Plan One (JRS-I) and Judicial Retirement System of Texas Plan Two (JRS-II).

(a) Tables for calculation of optional factors.

(1) The 1981 reduction factors for optional forms of retirement annuities are independent of the gender ~~[sex]~~ of the member and of the beneficiary ~~[nominee]~~ and are based on the GA-51 male mortality table projected with Scale C to 1970 with an age set forward of one year for retiring members and an age set back of four years for beneficiaries ~~[nominees]~~. The interest assumption is 5.0%.

(2) The 1992 reduction factors for optional forms of retirement annuities are independent of the gender of the member and the beneficiary and are based on the 1983 group annuity mortality table. The interest rate assumption is 8.5%.

(3) The reduction factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008,

for optional forms of retirement annuities are independent of the gender of the member and the beneficiary and apply to retirements effective on or after September 30, 2009. For retirements first effective prior to September 1, 2009, the previously adopted factors apply.

(4) [(3)] Copies of these tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207. The option tables, along with the adjustments described in this subsection are adopted by reference and made a part of this rule for all purposes.

(b) Option factors. The 2009 reduction factors for [AH] optional annuities for service retirement, disability retirement, and death benefit plans under the JRS-I and JRS-II plans apply to retirements first effective on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For retirements first effective prior to September 1, 2009, the previously adopted factors apply. [are calculated using the 1981 factors. Option factors for service retirement, disability retirement, and for death benefit plans for a member of the JRS-II are calculated using the 1992 factors.] All option factors have been developed by the actuaries and are adopted by reference subject to the limitations of this subsection. The reduction [Both sets of option] factors are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(c) Formula for JRS-II reduction factors for death before age 65.

(1) A death benefit annuity of the Judicial Retirement System of Texas Plan Two on behalf of a member dying before age 65 while not eligible for an unreduced service retirement benefit is reduced for each whole or partial calendar month that occurs during the period from the date of death to the 65th birthday, including the months that contain the dates of death and birthday. For the first 120 months (ages 55-64), the annuity is reduced by one-third of 1.0% per month. For the next 60 months (ages 50-54), the annuity is reduced by one-fourth of 1.0% per month. For the next 60 months (ages 45-49), the annuity is reduced by one-sixth of 1.0% per month. For the next 120 months (ages 35-44), the annuity is reduced by one-twelfth of 1.0% per month.

(2) A death benefit annuity on behalf of a member dying before age 65 while eligible for an unreduced service retirement benefit shall not be reduced for age.

(3) JRS-II reduction factors for death before age 65 have been developed by the actuaries and are adopted by reference subject to the limitations of this subsection. The reduction factors that apply to deaths of members prior to age 65 and that occur on or after September 1, 2009, are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For deaths occurring prior to September 1, 2009, the previously adopted factors apply. The set of reduction factors is available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(d) Reserve factors. The reserve factors for JRS-II are adopted by reference and made a part of this rule for all purposes. The reserve factors apply to periods beginning on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For periods occurring prior to September 1, 2009, the previously adopted factors apply. Copies of these tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(e) Dollar limitations for maximum annual benefit. Service retirement annuities shall conform to dollar limitations and applicable adjustments under the Internal Revenue Code of 1986, §415 (26 United States Code §415) as determined by the federal commissioner of internal revenue.

§77.21. Purchase of Additional Service Credit.

(a) The provisions of this section apply only to the Judicial Retirement System of Texas Plan Two (JRS-II).

(b) An eligible member may establish equivalent membership service credit authorized by §838.108, Texas Government Code, as provided in this section. The provisions of §77.15 of this title (relating to Payments To Establish or Reestablish Service Credit) [Chapter] do not apply to service credit established under this section.

(c) A member is eligible to establish service credit under this section in the membership class in which the member holds a position if the member:

(1) has 120 months of service credit for one or more periods of time during which the member held a position as a judge and the required contributions were made;

(2) is a member of the system at the time credit is established; and

(3) is not eligible to establish other credit or service.

(d) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the credit established under this section. The tables recommended by the system's actuary and adopted by the board shall be used by the system to determine the actuarial present value. The additional service credit tables for JRS-II are adopted by reference and made a part of this rule for all purposes. The 2009 additional service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For service purchase calculations performed prior to September 1, 2009, the previously adopted tables apply. Copies of these tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.[:] [Figure: 34 TAC §77.21(d)]

(e) Actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the actuaries and adopted by the board.

(f) Credit shall be established in whole year increments of credit.

(g) A member who establishes credit under this section shall certify that the member is not eligible to establish other credit or service and shall waive any and all right to establish such credit or service that the member had on the date of the deposit required by subsection (d) of this section.

(h) Credit established under this section may not be used to compute the amount of a disability retirement annuity.

(i) A member who withdraws contributions and cancels credit established under this section may not reestablish such credit under §838.102, Texas Government Code, but may again establish credit as provided in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901345

Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

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For further information, please call: (512) 867-7416



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL SUBCHAPTER A. CRASH INVESTIGATIONS

37 TAC §§3.7 - 3.9

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §§3.7 - 3.9, concerning Crash Investigations. Repeal of the sections is necessary due to the transfer of the powers and duties for crash reports from the Texas Department of Public Safety (TxDPS) to the Texas Transportation of Transportation (TxDOT).

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to

protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Government Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the repeals may be submitted to Major William Diggs, Texas Department of Public Safety, Texas Highway Patrol Division, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2119.

The repeals are proposed pursuant to Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Senate Bill 766, Acts 2007, 80th Legislature, Regular Session.

Government Code, §411.004(3) and Senate Bill 766, Acts 2007, 80th Legislature, Regular Session are affected by this proposal.

§3.7. *Definitions and Classifications.*

§3.8. *Reporting by Involved Drivers.*

§3.9. *Reporting by Investigating Officers.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 3, 2009.

TRD-200901301

Stanley E. Clark

Director

Texas Department of Public Safety

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 424-2135



PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 343. SECURE JUVENILE PRE-ADJUDICATION DETENTION AND POST-ADJUDICATION CORRECTIONAL FACILITIES

The Texas Juvenile Probation Commission (TJPC) proposes new Chapter 343, §§343.100, 343.102, 343.104, 343.106, 343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248, 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, 343.386, 343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414,

343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448, 343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, 343.498, 343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, 343.712, 343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816 and 343.818, relating to standards for secure juvenile pre-adjudication detention and post-adjudication correctional facilities. These new standards are being proposed in an effort to ensure that the minimum standards for secure pre and post-adjudication juvenile facilities reflect practices specific to federal constitutional requirements, relevant federal statutes, and national standards and related best practices models. Additionally, these standards are being proposed to ensure that the Texas Juvenile Probation Commission's related standards monitoring expectations are clearly identified within the context of Administrative Code rules. These standards were originally published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 527) and are being withdrawn and republished with substantive changes for another thirty day public comment period.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the amendments are in effect, there will be no fiscal implications for small business as a result of enforcement or implementation. Ms. Capers has determined that there will be limited fiscal implications for state government and local government as a result of enforcement or implementation, including:

Section 343.404. Under this proposed standard, a consultation may result in fiscal implications if assessments or evaluations are recommended by a qualified mental health professional (QMHP) or a mental health professional (MHP). The diversity of the recommendations a QMHP or a MHP may make does not readily lend itself to a reliable cost analysis. There could be a fiscal impact for those jurisdictions that do not have access to a QMHP or that do not employ a MHP. The costs associated with mental health consultations may be offset by the TJPC's \$5 million Legislative Appropriations Request (LAR) to assist in funding mental health professionals in all pre and post-adjudication facilities across the state.

Section 343.406. This proposed standard would require professionally administered health assessments for detainees who are identified (by formalized screening, request, or observation) as having a medical need. Additionally, the standard would require a professionally administered health assessment for youth held in detention for 30 consecutive days that have not already had said assessment completed. The 30-day requirement would only impact a small percentage of the State's annual detention population because the current average length of stay is approximately 13 days. In 2007, approximately 6,300 (11.12%) of the 56,000 plus youth detained were held for 30 days or longer. Of these 6,300 youth, approximately 2,600 were detained in the State's three largest jurisdictions, which had health care professionals actually administering initial screenings or providing

standardized follow up (i.e., assessment) of youth soon after admission (both practices would negate the need for 30-day assessments). The remaining 3,700 youth would be further reduced by exempting those with a prior health assessment (up to one year old) provided by an alternative source (e.g., school, parent, prior juvenile justice contact, etc.). The remaining detainees impacted by the proposed standards could be professionally assessed by a licensed nurse for approximately \$85.00 per assessment.

Section 343.428 and §343.622. These proposed standards would require that before a juvenile supervision officer (i.e., juvenile detention officer) assumed their standardized supervision duties, an officer would have to complete training in at least 40 hours of designated core topics plus an additional 24 hours of training in restraint technique and basic first aid and CPR. This provision would require at least 64 hours of training before an officer assumed his or her duties. Currently, an officer can assume these duties with approximately 28 to 32 hours of instruction in a restraint technique (approximately 16 hours), first aid and CPR (8 hours combined), abuse and neglect reporting requirements (2-4 hours), and facility-specific resident suicide prevention policies (2-4 hours). Therefore, the required training hours (and potential associated costs) could increase by approximately 44%. The TJPC has increased the availability of web-based training seminars to help offset increased training requirements.

Section 343.812. There are multiple provisions within this proposed standard that may have a fiscal impact on those select secure facilities that utilize non-ambulatory restraints. It is important to note that use of non-ambulatory restraint devices is not required per TJPC standards. Therefore, the following fiscal impact summaries would be applicable only to those jurisdictions that decide to incorporate non-ambulatory restraints. Subsection (d) of this section would restrict resident rooms with fixed restraint apparatus from housing ineligible youth (those not subject to non-ambulatory restraint) or require that static restraint fixtures within the unit be removed or defeated. Subsection (e) of this section would prohibit jurisdictions from fabricating their own non-ambulatory restraint devices and require they purchase professionally manufactured and commercially available devices instead. The TJPC's research indicates that a professionally manufactured and commercially available restraint bed (with all necessary attachments) could cost anywhere from approximately \$1,400.00 to \$2,700.00 per unit. Subsection (f) of this section would require that non-ambulatory restraints lasting longer than one hour in duration are accompanied by the relevant recommendations submitted by a health care professional or a mental health professional. And finally, subsection (i) of this section requires that youth in non-ambulatory restraints be provided constant visual supervision by a juvenile supervision officer (i.e., detention officer). This may then require the allocation of additional JSOs.

Ms. Capers has also determined that for each year of the first five years the new rules are in effect, the public benefit expected as a result of enforcement or implementation will be the improved conditions of confinement for youth incarcerated in the State's secure pre and post-adjudication juvenile facilities and enhanced training credentials for the direct care staff serving and supervising these youth. There will be no impact on small business or individuals as a result of the amendments.

Public comments on the proposed rules may be submitted in writing to Diane Laffoon at the Texas Juvenile Probation

Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Diane.Laffoon@tjpc.state.tx.us* or faxed to (512) 424-6718.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§343.100, 343.102, 343.104, 343.106

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§343.100. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless otherwise expressly defined within the chapter.

(1) Acting Facility Administrator--The certified juvenile supervision officer who is designated in writing by the facility administrator to be in charge during his or her absence.

(2) Behavioral Health Assessment--A mental health assessment conducted by a Masters-level counselor with Texas State licensure (i.e., LPC, LMFT and LCSW) that includes information from testing, review of background information and clinical interview(s). See the Commission's commentary of §343.600 of this chapter for a complete listing of the specific elements required to be addressed in this assessment.

(3) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department for a single county or a multi-county judicial district.

(4) Commission--The Texas Juvenile Probation Commission (TJPC).

(5) Common Activity Area--Area inside the facility to which residents have access and in which activities are conducted. This area includes, but is not limited to dayrooms, covered recreation areas, recreation rooms, education rooms, counseling rooms, testing rooms, visitation areas, and medical or dental rooms.

(6) Contraband--Any item not issued to employees for the performance of their duties and which employees have not obtained supervisory approval to possess. Contraband also includes any item given to a resident by an employee or other individual, which a resident is not authorized to possess or use. Specific items of contraband include, but are not limited to:

- (A) firearms;
- (B) knives;
- (C) ammunition;
- (D) drugs;
- (E) intoxicants;
- (F) pornography; and

(G) any unauthorized written or verbal communication brought into or taken from an institution for a resident, former resident, associate of or family members of a resident.

(7) Date and Time of Admission--The date and time a juvenile has been authorized for detention in a secure pre-adjudication

detention facility by an individual who is authorized by the juvenile board in accordance with §53.02 of the Texas Family Code. If the decision to detain was made prior to the juvenile's arrival to the facility, the date and time of admission shall be the same as the date and time of entry.

(8) Date and Time of Entry--The date and time a juvenile has been presented by law enforcement or county juvenile probation officer to a pre-adjudication secure detention facility for processing and authorization of detention.

(9) Design Capacity--The number of people that can safely occupy a building or space as determined by the current architectural design and any building modifications, licensing, accreditation, regulatory authorities, and applicable building codes.

(10) Designee--The person authorized to perform a specific duty as assigned by the facility administrator.

(11) Detention--The temporary secure custody of a child as defined in and authorized by Title 3 of the Texas Family Code.

(12) Disciplinary Seclusion--The separation of a resident from other residents for disciplinary reasons, and the placement of the resident alone in an area from which egress is prevented.

(13) Facility Administrator--Individual designated by the chief administrative officer or the governing board of the facility as the on-site program director or superintendent of a secure facility.

(14) Furlough--A period of time during which a resident is allowed to leave the facility premises and go into the community unsupervised for various purposes consistent with public interest.

(15) Hazardous Material--Any substance which is explosive, flammable, combustible, poisonous, corrosive, irritating or otherwise harmful and is likely to cause injury or death.

(16) Health Administrator--A person, who by virtue of education, experience or certification (e.g., MSN, MPH, MHA, FACHE, CCHP, MD), is capable of assuming responsibility for arranging all levels of health care and ensuring quality and accessible health services for juveniles.

(17) Health Assessment--The process whereby the health status of an individual is evaluated, which may include questioning the patient regarding symptoms.

(18) Health Care Professional--A term that includes physicians, physician assistants, nurses, nurse practitioners, dentists, medical and nursing care assistants, emergency medical technicians (EMT), and others who, by virtue of their education, credentials and experience, are permitted by law to evaluate and care for patients.

(19) Health Service Authority--The agency, organization, entity or individual responsible for consulting and collaborating with the facility administrator and/or the health services coordinator to ensure a coordinated and adequate health care system is available to residents of the facility.

(20) Housing Area--An area within a secure juvenile facility that contains any single occupancy housing unit or units (SOHU) and/or multiple occupancy housing unit or units (MOHU).

(21) Housing Unit--A unit within the housing area that may be designed and constructed as either a single occupancy housing unit (SOHU) or a multiple occupancy housing unit (MOHU).

(22) Individual Resident Sleeping Quarter--A cell or room designed and constructed to securely house one resident.

(23) Intra-Jurisdictional Custodial Transfer--The transfer of a resident from a pre-adjudication secure detention facility into a post-adjudication secure correctional facility under the same administrative authority.

(24) Isolation--The separation of a resident from other residents and the placement of the resident alone in an area from which egress is prevented for assessment, medical, or protective purposes.

(25) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program administered or operated under the authority of the juvenile board.

(26) Juvenile Supervision Officer--A person whose primary responsibility and essential function is the supervision of juveniles in a juvenile justice facility or a juvenile justice program operated by or under contract with the juvenile board.

(27) Material Safety Data Sheet (MSDS)--A document prepared by the supplier or manufacturer of a product clearly stating its hazardous nature, ingredients, precautions to follow, health effects and safe handling/storage information.

(28) Mental Health Assessment--An assessment that can only be completed by a licensed mental health professional. An assessment consists of gathering key information regarding the psychosocial needs and problems identified during a mental health screening, including the type and extent of mental health disorders and substance abuse disorders, other issues associated with the disorders and recommendation for treatment intervention.

(29) Medical Entity--An agency or organization that is primarily composed of health care professionals.

(30) Medical Treatment--Medical care, including diagnostic testing (e.g., x-rays, laboratory testing, etc.), performed or ordered by a physician, physician assistant, licensed nurse practitioner, emergency medical technician (EMT), or paramedic.

(31) Mental Health Paraprofessional--An individual who is able to perform tasks requiring significant knowledge, but without having the license or certification to perform at a professional level, including students, interns, fellows, post-doctorates, or other approved students in an official training program in psychology or a related field under the supervision of an authorized, licensed supervising mental health professional.

(32) Mental Health Professional--An individual who has met the educational requirements and is licensed or certified by one or more of the following governmental entities:

(A) the Texas State Board of Examiners of Psychologists;

(B) the Texas State Board of Examiners of Professional Counselors;

(C) the Texas State Board of Examiners of Marriage and Family Therapists;

(D) the Texas Department of State Health Services;

(E) the Texas Medical Board;

(F) the Texas State Board of Social Worker Examiners provided that the licensure is Licensed Clinical Social Worker; or

(G) the Texas State Board of Social Worker Examiners provided that the licensure is Licensed Master Social Worker accompanied with written recognition by the board for independent practice.

(33) Mental Health Screening--A process that includes a series of questions that are designed to identify a resident who is at an increased risk of having mental health disorders that warrant attention and a professional review.

(34) Military-Style Program--A program or component in a post-adjudication secure correctional facility for juvenile offenders that features military-style discipline and structure as an integral part of its treatment and rehabilitation program.

(35) Multiple Occupancy Housing Unit (MOHU)--A housing unit designed and constructed for multiple occupancy sleeping which is self-contained and includes appropriate sleeping, sanitation, and hygiene equipment or fixtures.

(36) Non-Program Hours--Time period when all scheduled resident activity for the entire resident population in the facility has ceased for the day.

(37) Physical Training Program--Any program that requires participants to engage in and perform structured physical training and activity. This does not include recreational team activities or activities related to the educational curriculum (i.e., physical education).

(38) Positive Screening--A scored result of a completed mental health screening instrument (i.e., MAYSI-2) recommending services requiring a primary service by a mental health professional as described on the MAYSI-2 reference card.

(39) Post-Adjudication Secure Correctional Facility ("Facility" or "Secure Facility")--A secure facility administered by a governing board that includes construction and fixtures designed to physically restrict the movements and activities of the residents and is intended for the treatment and rehabilitation of youth who have been adjudicated. Subchapters A, B, D and E of this chapter apply to all post-adjudication secure correctional facilities. A post-adjudication secure correctional facility does not include any non-secure residential program operating under the authority of a governing board.

(40) Pre-Adjudication Secure Detention Facility ("Facility" or "Secure Facility")--A secure facility administered by a governing board that includes construction and fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility and is used for the temporary placement of any juvenile or other individual who is accused of having committed an offense and is awaiting court action, an administrative hearing, or other transfer action. Subchapters A, B, C and E of this chapter apply to all pre-adjudication secure detention facilities. A pre-adjudication secure detention facility does not include a short-term detention facility as defined by §51.12(j) of the Texas Family Code.

(41) Premises--A building(s) together with its grounds or other appurtenances.

(42) Primary Control Room--A restricted or secure area from which entrance into and exit from a secure facility is controlled. The primary control room also contains the emergency, monitoring, and communications systems and is staffed 24 hours each day that residents are in the facility.

(43) Professionals--The following persons are considered professionals for limited purposes:

(A) teachers certified as educators by the State Board for Educator Certification including teachers certified by the State Board for Educator Certification with provisional or emergency certifications;

(B) educational aides or paraprofessionals certified by the State Board for Educator Certification;

(C) health care professionals licensed or certified by:

(i) the Texas Board of Nursing;

(ii) the Texas Medical Board;

(iii) the State Board of Physician Assistants;

(iv) the Texas Department of State Health Services;

or

(v) the Texas State Board of Dental Examiners;

(D) mental health professionals as defined herein;

(E) qualified mental health professional as defined herein;

(F) mental health paraprofessional as defined herein;

(G) social workers licensed by the Texas Board of Social Worker Examiners;

(H) juvenile probation officers certified by the Texas Juvenile Probation Commission; and

(I) commissioned law enforcement personnel.

(44) Protective Isolation--The exclusion of the threatened resident from the group by placing the resident in an individual room that minimizes contact with the residents from a specific group.

(45) Program Hours--Time period of no less than ten hours when the resident population has scheduled activities and any shift changes that occur during the time period when the resident population has scheduled activities.

(46) Qualified Mental Health Professional--An individual employed by the local mental health authority or an entity who contracts as a service provider with the local mental health authority who meets the guidelines of the Texas Department of State Health Services.

(47) Rated Capacity--The maximum number of beds available in a facility that were architecturally designed as a housing unit.

(48) Resident--A juvenile or other individual that has been lawfully admitted into a juvenile pre-adjudication secure detention facility or a post-adjudication secure correctional facility.

(49) Secondary Screening--A triage process that is brief and designed to clarify if a resident is in need of intervention or a more comprehensive assessment and what type of intervention or assessment is needed.

(50) Serious Mental Illness--A professional diagnosis of the following disorders: psychoses, schizophrenia, bipolar with psychotic features, depression with psychotic features, severe post-traumatic stress disorder, and schizoaffective disorders.

(51) Single Occupancy Housing Unit (SOHU)--A housing unit designed and constructed with separate and secure individual resident sleeping quarters and includes appropriate sleeping, sanitation, and hygiene equipment or fixtures.

(52) Standard Screening Instrument--An instrument approved by the Commission that screens the juvenile's needs in the area of mental health.

(53) Volunteer--Individuals agreeing to perform services without compensation, who have regular or periodic supervised contact or unsupervised contact with juveniles under the direction of the pre-adjudication and post-adjudication secure juvenile facility.

(54) Youth-on-Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, or sexual performance as those terms are defined herein:

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with an object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons, including simulated or actual sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(E) A juvenile may not consent to the acts as defined herein under any circumstances. Consent may not be implied regardless of the age of the juvenile.

§343.102. Interpretation and Applicability.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards herein.

(b) Including. The word "including", when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but, rather, as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

(c) Applicability. This chapter applies to all secure juvenile pre-adjudication detention facilities and post-adjudication correctional facilities in this State, except for a facility operated or certified by the Texas Youth Commission. This chapter does not apply to a facility that is licensed by a state governmental entity or that is exempt from licensure by state or federal law. Furthermore, all standards requiring written policies and procedures are expected to be implemented and practiced.

(d) Compliance Resource Manual and Implementation of Agency Policy. The Commission may establish by administrative rule or other reasonable agency policy, the required guidelines, procedures, and documentation necessary to ensure compliance and verification of the standards set forth in this chapter.

§343.104. Waiver.

Unless expressly prohibited by another standard, the governing board, the chief administrative officer, or facility administrator may make an application for waiver of any standard or standards adopted by the Commission in accordance with Chapter 349 of this title.

§343.106. Variance.

Unless expressly prohibited by another standard, the juvenile board may make an application for variance of any standard or standards adopted by the Commission in accordance with §349.2 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6822



SUBCHAPTER B. PRE-ADJUDICATION AND POST-ADJUDICATION SECURE FACILITY STANDARDS

37 TAC §§343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248 - 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, 343.386

These standards are proposed under §141.042 of the Texas Human Resources Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§343.200. Authority to Operate Secure Juvenile Facility.

Pursuant to Texas Family Code Title 3, a pre-adjudication secure detention facility and a post-adjudication secure correctional facility for juvenile offenders may only be operated by:

- (1) a governmental unit in this State; or
- (2) a private entity under a contract with a governmental unit in this State.

§343.202. Acceptance of Residents.

A facility may only accept and admit a child, as that term is defined in §51.02(2) of the Texas Family Code, who:

- (1) has been charged with or adjudicated of an offense or offenses against the laws of this State;
- (2) is authorized to be detained or confined pursuant to Title 3 of the Texas Family Code; or

(3) is a juvenile adjudicated of offenses committed against the laws of another state or the United States whose confinement is authorized pursuant to Chapter 342 of this title.

§343.204. Facility Governing Board.

Each facility shall have a governing board that functions in an oversight capacity to the facility. The governing board shall be a governmental unit or a board of trustees appointed by the governmental unit that establishes and operates or contracts for the establishment and operation of the facility. The governing board for the facility shall provide oversight of facility operations, policies and procedures.

§343.206. Certification and Registration of Facility.

Before admitting residents, the juvenile board in the county where the facility is located, shall:

(1) certify the facility in compliance with §51.12 or §51.125 of the Texas Family Code;

(2) designate the number of pre-adjudication and post-adjudication beds in the facility certification;

(3) register the facility with the Commission in compliance with §51.12 or §51.125 of the Texas Family Code; and

(4) post within a public area of the facility the current facility certification and the Commission's facility registration.

§343.208. Policy, Procedure, and Practice.

The governing board of the facility shall require that written policies and procedures exist governing the operation of all secure juvenile pre-adjudication detention and post-adjudication correctional facilities in the county. The policies, procedures, and practices of the facility shall include:

(1) a policy in the following areas strictly prohibiting:

(A) physical, sexual or emotional abuse, neglect or exploitation of a resident by any individual having contact with a resident of the facility;

(B) youth-on-youth sexual conduct between residents;

(C) violations of the juvenile supervision officer code of ethics and code of conduct as outlined in Chapter 341 of this title;

(D) violations of any professional code of ethics or conduct by any individual providing services to or having contact with residents of the facility; and

(2) a zero tolerance policy and practice regarding sexual abuse in accordance with the Prison Rape Elimination Act of 2003 that provides for administrative and/or criminal disciplinary sanctions.

§343.210. Designation and Qualifications of Facility Administrator.

(a) The chief administrative officer or the governing board of the facility or their designee shall designate a single facility administrator for each secure facility.

(b) The facility administrator shall:

(1) have acquired a bachelor degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board;

(2) have either:

(A) one year of graduate study in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission; or

(B) one year of experience in full-time case work, counseling, or community or group work;

(i) in a social service, community, corrections, or juvenile agency that deals with offenders or disadvantaged persons; and

(ii) the Commission determines the kind of experience necessary to meet this requirement; and

(3) maintain an active Commission certification as a juvenile supervision officer.

§343.212. Duties of Facility Administrator.

(a) The facility administrator shall be responsible for the daily operations of the facility and shall maintain an office at the facility.

(b) The facility administrator shall designate a certified juvenile supervision officer to be in charge during his or her absence from the facility.

(c) The facility administrator shall develop, implement and maintain a policies and procedures manual for the facility and shall ensure the daily facility practice conforms to the policies and procedures detailed in the manual.

(d) The facility administrator shall review the facility's policies and procedures manual at least every 365 calendar days and maintain documentation of this review.

(e) The facility administrator shall make available the policies and procedures manual to all employees of the facility.

(f) The facility administrator shall ensure that all employees of the facility are:

(1) trained on the policies and procedures manual provisions relevant to the employee's job functions during new employee orientation or prior to beginning service at the facility and maintain documentation of that training; and

(2) provided or made available, in a written or electronic format, all changes or modifications to the policies and procedures manual in a timely manner.

(g) The facility administrator or designee shall ensure that current, accurate and confidential personnel records are maintained for each employee which shall include:

(1) proof of age;

(2) documentation of criminal background checks conducted as required by this title;

(3) the completed application for employment;

(4) training records; and

(5) documentation of promotion, demotion, termination and other personnel actions.

(h) The facility administrator or chief administrative officer shall provide the presiding officer of the juvenile board or governing board of the facility with periodic updates on the operation of the facility, including the following information to be provided at least every quarter:

(1) facility population/capacity reports;

(2) number of serious incidents by category that occurred in the facility;

(3) number of resident restraints by type (e.g., personal, mechanical and chemical);

(4) number of injuries to residents requiring medical treatment; and

(5) number of injuries to staff requiring medical treatment.

(i) The facility administrator or chief administrative officer shall ensure the accurate and timely submission of statistical data to the Commission in an electronic format or other format as requested by the Commission.

(j) The facility administrator or chief administrative officer shall ensure that all individuals employed by the facility who have unsupervised contact with residents are subjected to all required criminal history background checks as required by Chapter 344 of this title.

§343.214. Data Collection.

The facility administrator or chief administrative officer shall maintain and report to the Commission electronically, or in the format requested, accurate statistics in the following areas:

(1) total number of grievances;

(2) total number of personal restraint incidents;

(3) total number of mechanical restraint incidents;

(4) total number of chemical restraint incidents;

(5) total number of non-ambulatory restraint incidents;

(6) total number of disciplinary seclusions; and

(7) total number of detention staff injuries resulting from interaction with residents.

§343.218. Location and Operations.

(a) Co-located Facilities.

(1) If the facility is located in the same building or on the grounds of any type of adult corrections facility, it shall be a separate, self-contained unit.

(2) All applicable federal and state laws pertaining to the separation of juveniles from adult inmates shall apply.

(3) The facility shall submit information and agree to monitoring from the Office of the Governor and/or the contract representative.

(b) Separate Operations.

(1) All pre-adjudication programs shall be operated separately from any post-adjudication programs.

(2) Where a pre-adjudication program and a post-adjudication program are located in the same building or on the same grounds, contact between the two populations shall be kept to a minimum.

(c) Non-Secure Programming on Facility Premises. Any youths who participate in day programming on the facility premise who are not residents of the facility shall be kept physically separated from residents of the facility at all times.

§343.220. Population.

The population of the facility shall not exceed the rated capacity of the facility.

§343.222. Heating and Ventilation.

(a) The facility shall provide fully functioning heating, cooling and ventilation systems adequate for the square footage of the facility.

(b) Alternate means of ventilation in the facility shall be maintained in case regular power is interrupted.

§343.224. Alternate Power Source.

(a) The facility shall have an alternate source(s) of electrical power that provides for the simultaneous operations of life safety systems including:

- (1) emergency lighting;
- (2) illuminated emergency exit lights and signs;
- (3) emergency audible communication systems and equipment;
- (4) fire detection and alarm systems;
- (5) ventilation and smoke management systems; and
- (6) all secure door locking mechanisms which operate exclusively on electric current.

(b) The alternate power source system shall be tested at least every 15 calendar days to ensure the system is in working condition.

(c) The alternate power system (e.g., the alternate power source and the life safety systems required to be operated) shall be inspected at least every 365 calendar days. This inspection must be completed by a person with qualifications established through work experience, relevant training, specialized licensure or certification.

(d) All of the aforementioned tests shall be documented to minimally include test date and test results.

(e) Any system malfunctions or maintenance needs that are identified during a test, or at any other time, shall require that a written maintenance request be immediately submitted to the appropriate personnel.

§343.226. Lighting.

(a) Lighting. Adequate lighting shall be provided to all areas of the facility.

(b) Natural Lighting. All housing units shall provide natural light available from a source within the housing unit. This standard also applies to all specialized housing.

§343.228. Dining Area.

The dining area shall provide a minimum of 15 square feet of floor space per diner.

§343.230. Specialized Housing.

Any room utilized for the disciplinary seclusion, protective isolation, assessment isolation, or medical isolation of residents from the general population during program hours shall be equipped with:

- (1) an operable toilet above floor level;
- (2) a washbasin with hot and cold running water; and
- (3) a bed above floor level.

§343.232. Housing for Residents with Physical Disabilities.

All housing areas used by residents with a physical disability shall be designed for their use and provide for their safety and security in accordance with state and federal law.

§343.234. Program Areas.

The facility shall provide space for:

- (1) visitation;
- (2) religious activities;
- (3) interviewing and counseling; and
- (4) educational instruction.

§343.236. Secure Storage Areas.

(a) Cleaning Supplies. Storage of cleaning supplies and equipment shall be locked and not accessible to residents.

(b) Restraint Devices. There shall be a location for secure storage of restraining devices and related security equipment. This equipment shall be readily accessible to authorized persons.

(c) Personal Property. Space shall be provided for secure storage of the resident's personal property.

§343.238. Hazardous Materials.

(a) The facility shall maintain an inventory and a copy of the Material Safety Data Sheet (MSDS) for all hazardous materials located in the facility.

(b) The facility shall prohibit the use of all hazardous materials by residents.

(c) Exceptions. Materials manufactured specifically for cleaning purposes may be used by residents for cleaning areas of the facility under the constant supervision of the juvenile supervision officer. The resident must be provided instruction on the use of the hazardous material and the proper equipment as prescribed by the MSDS.

(d) Any use of hazardous materials shall be used according to the manufacturer's instructions.

§343.240. Safety Codes.

(a) The facility shall conform to the provisions set forth in the Life Safety Code, National Fire Protection Association (NFPA) 101 and/or any applicable state and local fire safety codes. The Life Safety Code may be substituted with local government ordinances or codes only if said ordinances or codes are specifically written to include building occupancy for detention and correctional usage.

(b) A formalized Life Safety Code/fire safety inspection shall be completed prior to the facility becoming operational.

(c) All subsequent Life Safety Code/fire safety inspections shall be conducted no later than 365 calendar days from the date of previous inspection.

(d) Each Life Safety Code/fire safety inspection shall result in a written report that minimally contains the following information:

(1) the identification of the specific code(s) used to complete the inspection. The code(s) in question will either be the NFPA's Life Safety Code 101 or the applicable state, municipal, or county specific fire code adopted by the jurisdiction;

(2) the name of the governmental entity that conducted the inspection;

(3) the identification of any applicable code violations or infractions and the corresponding corrective action requirements;

(4) the name and title of the person conducting the inspection; and

(5) the date(s) of the inspection.

(e) Any deficiencies noted in the annual inspection report shall be immediately addressed by the facility administrator or designee. The facility administrator shall develop and document a corrective action plan to rectify all deficiencies.

§343.242. Fire Safety Plan.

(a) The facility shall have in effect and available to all supervisory personnel, written copies of a fire safety plan for the protection of

all persons in the event of a fire for their evacuation to areas of refuge and for their evacuation from the building if necessary.

(b) The fire safety plan shall be coordinated with and reviewed by the fire department whose jurisdiction includes the facility. The coordination and review efforts required in this standard shall be validated by written documentation prepared or attested to by a representative of the applicable fire department.

(c) The fire safety plan shall require that all employees be instructed to ensure the following:

- (1) proper disposal of combustible refuse;
- (2) prompt evacuation of the facility; and
- (3) procedures for the use and control of flammable, toxic, and caustic materials.

§343.244. Fire Safety Officer.

The fire safety officer shall:

- (1) ensure maintenance of a current fire drill log;
- (2) ensure that fire drills are conducted as required by §343.246 of this chapter;
- (3) ensure the posting of a plan for prompt evacuation of the facility as required by §343.246 of this chapter;
- (4) implement procedures for proper disposal of combustible refuse; and
- (5) implement procedures for the use and control of flammable, toxic, and caustic materials.

§343.246. Fire Drills.

(a) Required Fire Drills. The fire safety officer or designee shall conduct fire drills on all shifts at least every 90 calendar days.

(b) All staff on duty in the facility shall participate in the fire drills.

(c) Exits. Facility exits shall be clear of obstruction and properly marked for evacuation in the event of fire or emergencies.

(d) Evacuation Plans. Facility emergency evacuation plans shall be posted in resident restricted areas.

§343.248. Non-Fire Emergency Preparedness Plan.

The facility shall have an emergency preparedness plan that includes, but is not limited to severe weather, natural disasters, disturbances or riots, national security issues, and medical emergencies. The plan shall address:

- (1) the identification of key personnel and their specific responsibilities during an emergency or disaster situation;
- (2) agreements with other agencies or departments; and
- (3) transportation to pre-determined evacuation sites.

§343.249. Internal Security.

(a) Policies and Procedures. Written policies and procedures for security and control of the facility shall include the following:

- (1) continued operations in the event of a work stoppage;
- (2) key control;
- (3) control of the use of:
 - (A) tools;
 - (B) medical equipment; and

(C) kitchen tools;

(4) provisions to prevent firearms from entering the secure area of the facility; and

(5) provisions for coordination with law enforcement authorities in the case of escape or other situations requiring assistance from city, county or state law enforcement agencies.

(b) Documentation.

(1) The facility administrator or designee shall ensure the documentation of all special incidents, including, but not limited to the taking of hostages, escapes, and assaults.

(2) A copy of the report shall be placed in the permanent file of any resident(s) involved in the incident.

(c) Video and Audio Surveillance. Video and audio monitoring devices may be utilized for security purposes but shall not substitute for required levels of supervision by a juvenile supervision officer.

§343.250. External and Perimeter Security.

(a) The facility shall be constructed so that residents remain within the premises and the general public is denied access without authorization.

(b) Perimeter security shall be maintained at all times. Any outdoor area in which residents are permitted shall be enclosed by a permanently erected fence or wall to help prevent resident escapes and unauthorized public entry to the facility grounds.

§343.260. Resident Searches.

(a) Residents shall only be subjected to the following searches:

(1) a pat down or frisk search as necessary for facility security and safety;

(2) an oral cavity search to prevent concealment of contraband, to ensure the proper administration of medication;

(3) a strip search in which the resident is required to surrender their clothing based on the reasonable belief that the resident is in possession of contraband or if there is reasonable belief that the resident presents a threat to the facility's safety and security;

(A) a strip search shall be limited to a visual observation of the resident and shall not involve the physical touching of a resident;

(B) a strip search shall be performed in an area that ensures the privacy and dignity of the resident; and

(C) a strip search shall be conducted by a staff member of the same gender as the resident being searched;

(4) an anal or genital body cavity search only if there is probable cause to believe that they are concealing contraband;

(A) an anal or genital body cavity search shall be conducted only by a physician; and

(B) all anal and genital body cavity searches shall be conducted in an office or room designated for medical procedures; and

(C) all anal and genital body cavity searches shall be documented with the documentation being maintained in the resident's file.

(b) During searches, the residents shall not be touched any more than necessary to conduct a comprehensive search; and

(c) Every effort shall be made to prevent embarrassment or humiliation of the resident.

§343.262. Hygiene Plan.

Residents shall be given appropriate instruction on hygiene and shall be required to comply with acceptable rules of personal cleanliness and oral hygiene.

§343.264. Personal Hygiene.

Residents shall be required to shower daily.

§343.266. Bedding.

(a) Each resident shall be provided suitable clean bedding, including two sheets, a pillow and a pillowcase, a mattress, and a blanket. Mattresses with an integrated pillow may be substituted for a separate pillow and a pillowcase.

(b) Clean bed linens shall be issued at least every seven calendar days.

(c) Modifications to a resident's bedding items may be made in accordance with §343.340(a)(8) of this chapter.

(d) In no case, shall residents on suicide supervision be denied appropriate bedding substitutions.

(e) If the resident has demonstrated a pattern of misuse of bed linens or if staff have reason to believe the resident will misuse the bed linens, which includes but is not limited to using the sheets as a weapon, the sheets may be substituted with a blanket.

§343.268. Towels.

A clean towel shall be issued to each resident daily.

§343.270. Clothing.

(a) Clean clothing shall be provided to each resident upon admission into the facility.

(b) Clean and disinfected undergarments and socks shall be issued daily and other clean clothing shall be issued at least twice per week.

(c) Climate appropriate clothing shall be provided to all residents in the facility for any outdoor programming or activities.

(d) A resident on suicide supervision status may have their clothing requirements modified per the facility's suicide prevention plan in §343.340 of this chapter. However, in no case, shall residents on suicide supervision be left in an unnecessary state of undress.

§343.272. Housekeeping Plan.

A written housekeeping plan shall be followed which promotes and ensures cleanliness, facility sanitation, and control of vermin and pests.

§343.274. Resident Discipline Plan.

Each facility shall develop and implement a written resident discipline plan that provides for the fair and consistent application of resident rules and sanctions. A resident discipline plan shall minimally include:

(1) resident rule violations categorized into minor infractions and major infractions as well as the corresponding sanctions available to staff. Minor infractions shall be limited to those rules which do not represent serious offenses against persons or property and do not pose a serious threat to institutional order and safety. Major infractions shall be limited to those rules which constitute serious offenses against persons or property and pose a serious threat to institutional order and safety;

(2) provisions to ensure that rule infractions or resident behaviors which constitute probable cause for an offense of a class B misdemeanor or above shall be referred to the law enforcement agency with applicable jurisdiction for possible investigation and/or prosecution;

(3) a listing of prohibited sanctions for residents that minimally includes:

(A) corporal punishment;

(B) humiliating punishment including verbal harassment of a sexual nature or that relates to a resident's sexual orientation or gender identity;

(C) allowing or directing one resident to sanction another;

(D) group punishment for the acts of individuals;

(E) deprivation or modification of required meals and snacks;

(F) deprivation of clean and appropriate clothing;

(G) deprivation or intentional disruption of scheduled sleeping opportunities;

(H) deprivation or intentional delay of medical and mental health services; and

(I) physical exercises imposed for the purposes of compliance, intimidation, or discipline with the exception of practices allowed in §343.710 of this chapter;

(4) provisions that a resident shall be provided written notice of the alleged rule violation against him or her no more than 24 hours after the violation;

(5) provisions for an informal process for residents to resolve conflict with rule infractions and the corresponding sanctions, if the facility chooses to employ such a process; this shall include established guidelines that provide instruction for residents and staff in using this informal process to review and resolve resident concerns. In no case, shall a resident be sanctioned or retaliated against for electing to forego the informal disciplinary review process when they are eligible for formal disciplinary reviews;

(6) provisions for disciplinary reviews for major rule infractions, including established requirements of when to initiate formal disciplinary reviews and any ensuing appeals. The facility's policies and procedures shall not deny or restrict a formalized disciplinary review or appeal when one is requested by a resident with eligible standing; and

(7) provisions for the administrative review and closure of formal disciplinary reviews that are not disposed of prior to a resident's discharge from the facility.

§343.276. Formal Disciplinary Reviews for Major Rule Infractions.

Residents that receive a major rule violation or sanction are eligible to request a formal disciplinary review. Upon such a request, a resident shall receive a formal disciplinary review within ten calendar days.

§343.278. Formal Disciplinary Reviews for Residents in Disciplinary Seclusion.

(a) Residents in disciplinary seclusion shall receive the following due process reviews during the period of their seclusion. The reviews in paragraphs (1) and (2) of this subsection shall be conducted in a face-to-face setting by supervisory-level staff which shall not include any staff member involved in the alleged rule violation or the imposed sanction(s). Each of these two review procedures shall be appropriately documented and the corresponding documentation shall be retained in the resident's file. The following procedures shall be conducted:

(1) Upon the 24th hour of seclusion the resident shall receive an informal disciplinary review which includes an overview of the facility's formal disciplinary review process. If the 24th hour of

seclusion occurs during non-program hours, then the informal review shall be conducted no later than two hours after the start of ensuing day's program hour schedule.

(2) A resident assigned to an extended period of seclusion beyond 24 hours shall have a formal disciplinary review no later than his or her 72nd hour of seclusion per §343.280 of this chapter. If the 72nd hour of seclusion occurs during non-program hours, then the formal disciplinary review shall be conducted no later than two hours after the start of the ensuing day's program hour schedule.

(b) A resident may choose to waive the right to a disciplinary review provided proper notification is given prior to the signing of the waiver. The waiver shall include the applicable rule violation and sanction plan.

§343.280. Formal Disciplinary Review Process.

The formal disciplinary review process shall, at a minimum, adhere to the following requirements:

(1) Disciplinary reviews must be before a neutral and impartial officer or board that shall not include any staff member involved in either the alleged rule violation or the imposed sanction.

(2) Provisions shall be made for the disclosure of the evidence against the resident accused with a rule violation on his or her behalf.

(3) A resident shall have the opportunity to be heard in person and to present evidence on his or her behalf.

(4) A resident shall have the opportunity to request relevant witnesses on his or her behalf.

(5) A resident shall have the opportunity to secure the aid of a staff member if the resident is illiterate, disabled, or otherwise unable to understand the nature of the proceedings.

(6) If the disciplinary review determines that the resident did not commit a rule violation or that the corresponding sanction was inappropriate, facility staff shall restore or reinstate any denied or modified resident privileges.

(7) At the conclusion of a disciplinary review, a written statement by the disciplinary officer or disciplinary board shall be prepared indicating the evidence relied upon and justification for the disposition. The statement shall be made available to the resident for review and a copy shall be retained in the resident's file.

§343.282. Resident Appeals.

A resident may appeal the findings of a disciplinary review. The facility's resident discipline plan shall minimally include:

(1) provisions for a documented appeals process before the disciplinary officer or a person or persons not a member of the disciplinary board. The appeals process shall afford each of the due process provisions enumerated in §343.280(2) - (7) of this chapter;

(2) provisions that require the resident to submit the request for an appeal no later than seven calendar days after a disposition is rendered in the disciplinary review;

(3) provisions that require the resident's appeal to be heard within 30 calendar days of resident's request; and

(4) provisions for a written statement by the appeals officer or appellate board at the conclusion of the review indicating the evidence relied upon and justification for the disposition. The statement shall be made available to the resident for review and a copy shall be retained in the resident's file.

§343.286. Room Restriction.

(a) Room restriction may be used in increments of up to 90 minutes for behavior modification.

(b) During room restriction, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

§343.288. Disciplinary Seclusion.

(a) Disciplinary seclusion may be used when a resident commits a major rule violation or poses an imminent physical threat to self or others.

(b) A written disciplinary report which describes the resident's precipitating behavior and identifies the staff's response shall be completed promptly, but no later than the end of the shift on which the seclusion occurs. The report shall be submitted immediately to the facility administrator or the acting facility administrator for review.

(c) Seclusion in excess of 24 hours shall be approved in writing by the facility administrator or the acting facility administrator. The written approval of the facility administrator or the acting facility administrator shall also be required for each subsequent 24-hour extension.

(d) The seclusion of a resident with a known diagnosis of a serious mental illness requires consultation with a mental health professional prior to the authorization of any seclusion beyond a 24-hour period. If the seclusion occurs on a holiday or weekend and no mental health professional is available, the facility administrator or designee shall make a referral to the mental health professional and notify the mental health professional of the seclusion. The facility administrator or the acting facility administrator shall consult with the mental health professional as soon as possible after the referral.

(e) During disciplinary seclusion, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

(f) In addition to the requirements enumerated in subsections (a) - (c) and (e) of this section, the facility shall provide the secluded resident the disciplinary review mechanisms contained in §343.278 of this chapter.

§343.290. Protective Isolation.

(a) Protective isolation may be ordered when a resident is physically threatened by a resident or a group of residents.

(b) This decision shall be approved in writing by the facility administrator or the acting facility administrator.

(c) While in protective isolation, a juvenile supervision officer shall observe and record the resident's behavior at random intervals not to exceed 15 minutes.

(d) If the protective isolation of a resident exceeds 72 hours, the facility administrator or acting facility administrator shall immediately conduct a documented review of the circumstances surrounding the level of threat faced by the resident and make a determination as to whether other less restrictive protective measures are appropriate and available. If continued protective isolation is approved, the facility administrator, or acting facility administrator, shall ensure that the formalized written review document includes an alternative service delivery plan to ensure the isolated resident is afforded all required program services during their period of protective isolation.

§343.300. Nutritional Requirements.

Meals shall meet the dietary requirements of the United States Department of Agriculture (USDA).

§343.302. Menu Plans.

(a) The facility shall develop and follow daily written menu plans. Menu plans shall be reviewed and approved at least every 365 calendar days by a licensed or provisionally licensed dietician to ensure that the menu plans meet or exceed the requirements of the United States Department of Agriculture (USDA).

(b) If a facility staff determines that there is a legitimate need to deviate from an already approved written menu plan (e.g., delayed food delivery, spoiled/expired food, etc.), the reason for the deviation and menu substitution shall be fully documented. When menu substitutions are made, the substitution shall be of equal portions and nutritional value.

§343.304. Menu Content.

(a) Menus shall contain a variety of foods.

(b) The same menu or the same single meal shall not be served more than two consecutive days.

§343.306. Modified Diets.

Modified diets shall be provided upon the recommendation of a health care professional or when a resident's religious beliefs require it.

§343.308. Mealtime Prohibitions.

Residents shall not eat meals in their rooms unless it is necessary for facility safety and security (i.e., assignment to disciplinary seclusion, medical isolation, or assessment isolation or during riot or rebellion).

§343.310. Staff Meals.

Facility staff members on duty where residents are eating are not required to eat, but if they do, they shall eat the same food served to the residents unless a special diet has been ordered by a health care professional or a staff's religious beliefs require it.

§343.312. Daily Meal Schedule.

(a) Three meals shall be provided daily to each resident in the facility.

(b) At least two of the meals shall be hot.

(c) No more than 14 hours may elapse between the evening meal and breakfast unless a snack is provided.

(d) Residents shall be allowed no less than ten minutes to eat once they have received their food.

§343.314. On-site Food Preparation.

A facility that prepares food on site shall maintain a valid permit and any required licenses issued by the local health department or the Texas Department of State Health Services.

§343.316. Off-site Food Preparation.

A facility that receives food from an off-site source shall maintain a copy of the source's valid permit and any required licenses issued by the local health department or the Texas Department of State Health Services. The transfer of such food to the facility shall be conducted in a manner to prevent contamination or adulteration.

§343.320. Health Service Authority.

The facility shall have a designated health service authority responsible for the development and implementation of health care protocols within the facility. The health service authority shall be a physician, physician assistant, registered nurse, nurse practitioner, health administrator, or a medical entity. When a medical entity is designated as the health service authority, an individual shall be identified as the primary point of contact.

§343.322. Health Care Services.

(a) Health Service Plan. The facility shall have a written health service plan developed in consultation with the designated health service authority. The health service plan shall establish the facility's health care delivery system for all residents.

(b) Review of Health Service Plan. The health service plan shall be reviewed at least every 24 months in consultation with the health service authority.

§343.324. Health Services Coordinator.

(a) The facility shall have a designated health services coordinator on staff to coordinate health care delivery in the facility.

(b) If the health services coordinator is not a health care professional, the health services coordinator shall receive special training in health care and health care service delivery topics relevant to detention and correctional facilities and be familiar with local health care providers and facilities.

§343.326. Medical Referral.

If a staff member observes any resident to be in need of medical attention or if a resident requests medical attention, the resident shall be referred for medical services. The resident may not be denied access to health care if the resident will only disclose the condition or reason for the treatment request to a health care professional.

§343.328. Consent for Medical Treatment.

(a) Consent for medical treatment shall be secured in accordance with Chapter 32 of the Texas Family Code.

(b) Documentation of consent for medical treatment received, in accordance with Chapter 32 of the Texas Family Code, shall be maintained in the applicable resident files.

§343.330. Medical Treatment for Victims of Sexual Abuse.

Testing for sexually transmitted diseases, including HIV-AIDS, shall be made available to a resident who, at the conclusion of an internal investigation or Commission investigation of abuse, neglect or exploitation, is found to have been abused, neglected or exploited in a manner by which any physical injuries may have occurred or any sexually transmitted disease may have been contracted. The cost of the testing services and any subsequent medical treatment services shall not be assessed to the resident or the resident's family.

§343.332. Behavioral Health Care Services for Sexual Abuse Victims.

A mental health professional shall assess any resident who, at the conclusion of an internal investigation or Commission investigation of abuse, neglect or exploitation that occurred in the facility, is found to have been the victim of a sexual assault. The mental health professional shall assess the need for crisis intervention counseling and any subsequent long-term, follow-up or counseling services. The cost of the assessment and any subsequent counseling services shall not be assessed to the resident or the resident's family.

§343.334. Confidentiality.

(a) All medical and mental health screenings and assessments shall be conducted in a confidential setting consistent with facility operations and security.

(b) All interactions between a resident and a health care professional that involve treatment or an exchange of confidential medical information shall be conducted in private. The facility's policies and procedures may authorize a juvenile supervision officer to be present in the following situations:

(1) if the resident poses a substantial risk to the safety of the health care professional or others;

(2) if the facility has a written policy requiring the presence of a juvenile supervision officer during medical treatment;

(3) if the health care professional or resident requests the presence of a juvenile supervision officer during the treatment; or

(4) if the circumstances or situation indicate the presence of a juvenile supervision officer is necessary and prudent.

§343.336. Prescription Medication.

(a) Use of Medication. Except upon the order of a physician, physician assistant, dentist or nurse practitioner, no stimulant, tranquilizer, or psychotropic drug shall be administered to residents.

(b) Medication Policy. The juvenile board or governing board of the facility shall adopt a policy concerning the administration of medication to residents. The policy shall specify which facility personnel are authorized to administer medication to residents.

(c) Non-prescription Medication. Only staff that who have had appropriate training in the administration of medication shall administer non-prescription medication (i.e. over-the-counter medication). The medication shall be administered according to the product instructions unless otherwise instructed by the health service coordinator.

§343.338. Medical Isolation.

Medical isolation may be authorized as a health precaution at the direction of a health care professional, facility administrator or the acting facility administrator.

(1) The reasons for the medical isolation of a resident shall be documented and a copy placed in the resident's file.

(2) A resident that has been placed on medical isolation by a facility administrator or the acting facility administrator shall be seen by a health care professional within 12 hours of the initial medical isolation.

(3) During medical isolation, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed 15 minutes.

§343.340. Suicide Prevention Plan.

(a) Plan. The facility shall have a written suicide prevention plan developed in consultation with a mental health professional that, at a minimum, addresses the following components:

(1) definitions of moderate and high risk for suicidal behavior;

(2) a screening methodology to assess and assign a resident's risk of suicide upon admission into the facility, and upon any indication a resident previously screened may now be at moderate or high risk for suicidal behavior. The screening methodology shall include specific provisions regarding the assessment of risk when a resident refuses or is unable to cooperate with the screening process;

(3) communication protocols among facility staff, mental health professionals, the resident's juvenile probation officer, the resident and the resident's parent, legal guardian, or custodian, including communication regarding observations or indications a resident previously screened may now be at moderate or high risk for suicidal behavior;

(4) level of supervision for residents assigned to moderate or high risk for suicidal behavior;

(5) policies and procedures for intervening in suicide attempts;

(6) reporting of resident suicides and attempted suicides, in accordance with any applicable state law, administrative standard, or local policy or ordinance;

(7) staff training on the contents and implementation of the suicide prevention plan;

(8) housing of residents assigned to moderate or high risk for suicidal behavior, including the removal from the resident's presence any dangerous objects which may include clothing and bedding items; and

(9) mortality reviews designed to review the facility's compliance and possible needed revisions to the suicide prevention plan following a resident's suicide.

(b) Implementation. The facility shall implement the suicide prevention plan, and all residents shall be screened and assessed for suicide risk upon admission and as necessary thereafter.

§343.342. Review and Dissemination of Suicide Prevention Plan.

(a) The suicide prevention plan shall be reviewed every 365 calendar days in consultation with a mental health professional.

(b) The suicide prevention plan shall be disseminated or made available to all facility staff having responsibilities named or enumerated in the facility's suicide prevention plan.

§343.346. Mental Health Referral of High Risk Suicidal Youth.

(a) The facility shall refer a resident classified as high risk for suicidal behavior to a mental health professional or mental health agency within 24 hours from the time the resident is classified as such.

(b) The facility shall maintain written documentation that the referral was made. The documentation shall include:

(1) the name and title of the person who notified the mental health professional;

(2) the name and title of the mental health professional or name of the mental health agency notified;

(3) the date and time of the notification;

(4) the method of notification; and

(5) a brief description of the response provided by the mental health professional or a responsive document from the mental health professional.

§343.348. Supervision of High Risk Suicidal Youth.

(a) Observation. During non-program hours, or any time a resident classified as high risk for suicidal behavior is secluded from the general population:

(1) the resident shall be under the continuous, uninterrupted visual supervision of a juvenile supervision officer; and

(2) the supervising juvenile supervision officer shall document his or her personal observations of a high-risk resident at intervals not to exceed 30 minutes.

(b) Required Documentation. The following documentation shall be maintained for high-risk residents:

(1) the date and time the resident was classified as high risk for suicidal behavior;

(2) name and title of the person who classified the resident as high risk for suicidal behavior;

(3) a description of the resident's behavior and/or factors that led up to the resident's classification as high risk for suicidal behavior;

(4) name and title of the juvenile supervision officer providing supervision of the resident;

(5) the location of the resident's supervision;

(6) the date and time the resident was reclassified as no longer being high risk for suicidal behavior; and

(7) the name and title of the mental health professional or physician who recommended the reclassification of the resident as no longer being high risk for suicidal behavior.

(c) Reclassification. Reclassification of a resident designated as high risk for suicidal behavior to a lower risk level shall only be determined by a qualified mental health professional, a mental health professional or a licensed physician.

(1) Prior to being removed from a classification of high risk for suicidal behavior, a qualified mental health professional, mental health professional or a licensed physician shall conduct a review of the resident's current suicide risk and issue a written recommendation which addresses the following:

(A) the need to re-classify the resident's suicide risk level;

(B) the need for intervention strategies and/or services during the resident's period of confinement within the facility; and

(C) the need for additional assessment(s), screening(s) or evaluation(s).

(2) The written recommendation of the qualified mental health professional, mental health professional or licensed physician shall be maintained in the resident's record.

(3) The facility administrator or the acting facility administrator shall review the written recommendation of the qualified mental health professional, mental health professional or licensed physician prior to reclassifying a resident as no longer at high risk for suicidal behavior.

(4) Only the facility administrator or the acting facility administrator shall authorize the reclassification of a resident classified as high risk for suicidal behavior under this subsection.

§343.350. Supervision of Moderate Risk Suicidal Youth.

(a) Observation. Any time a resident is classified as a moderate risk for suicidal behavior and is in individual sleeping quarters, a juvenile supervision officer shall personally observe and record the resident's behavior at random intervals not to exceed ten minutes.

(b) Required Documentation. When providing supervision at random intervals, the juvenile supervision officer shall document:

(1) the date and time the resident was classified as moderate risk for suicidal behavior;

(2) the location of the resident's supervision;

(3) the name and title of the juvenile supervision officer providing supervision of the resident;

(4) each visual observation made and the time of the observation; and

(5) a general description of the resident's behavior.

(c) Reclassification. Only the facility administrator or the acting facility administrator shall authorize the reclassification of a resident classified as moderate risk for suicidal behavior under this section.

§343.352. Visitation.

(a) Residents have the right to receive visitors and to communicate subject only to the limitations authorized in §343.354 of this chapter.

(b) Residents shall be allowed visitation by a parent, legal guardian or custodian at least once every seven calendar days for at least thirty minutes or the equivalent over multiple visits.

(c) The parent, legal guardian or custodian of the resident shall be provided a copy of the visitation schedule.

(d) A registry of all visitors shall be maintained to document the name and relationship to the resident.

§343.354. Limitations on Visitation.

(a) The policies, procedures, and practices of the facility may limit a resident's visitation rights only to the extent required to maintain control and security of the facility.

(b) Restrictions on a resident's visitation rights shall not be imposed as a disciplinary sanction.

(c) The facility administrator or the acting facility administrator shall provide written documentation justifying any restriction placed on a resident's visitation rights.

(d) A resident shall not be denied communication or visitation with a parent, legal guardian, or custodian for a prescribed period of time after admission into the facility.

§343.356. Access to Attorney.

Residents shall be permitted reasonable confidential contact with the resident's attorney and their designated representatives through telephone, uncensored letters, and personal visits.

§343.358. Telephone.

(a) A resident shall be provided the opportunity for at least one five minute phone call every seven calendar days.

(b) Restrictions on a resident's telephone usage shall not be imposed as a disciplinary sanction.

(c) The parent, legal guardian, or custodian of the resident shall be provided a copy of the facility's policy regarding telephone usage.

§343.360. Mail.

(a) Residents shall be provided access to writing materials and postage for no fewer than two letters every seven calendar days.

(b) When a resident is released or transferred from the facility, his or her mail shall be forwarded to the resident's new address.

(c) Money received in the mail shall be held for the resident in their personal property inventory, with receipt provided, or returned to the sender.

§343.362. Limitations on Mail.

(a) Authorized Limitations. A resident's rights to privacy and correspondence may not be limited except when:

(1) a reasonable belief exists to suspect that the correspondence is part of an attempt to formulate, devise, or otherwise effectuate a plan to escape from the facility, or to violate state or federal laws. If such cause exists, then facility staff shall:

(A) ask the resident's permission to read the letter;

(B) if permission is denied, request a search warrant prior to opening and reading the letter; and

(C) if a search warrant request is denied, the correspondence shall be provided to the resident;

(2) correspondence with certain individuals is specifically forbidden by:

(A) the resident's juvenile court-ordered rules of probation or parole;

(B) the facility's rules of separation; or

(C) a specific list of individuals furnished by a resident's parents, legal guardians or custodians indicating who they feel should not communicate with the resident.

(b) Returning Mail. Such incoming correspondence as identified in subsection (a)(2) of this section shall be returned unopened to the sender.

(c) Withholding Mail. When mail is withheld from the resident, the reasons shall be documented and a copy placed in the resident's file.

§343.364. Legal Correspondence.

Residents shall be furnished adequate postage for legal correspondence during their confinement in the facility.

§343.366. Inspection of Mail.

Mail may be opened by staff only in the presence of the resident with inspection limited to searching for contraband.

§343.368. Illegal Discrimination.

Residents shall not be subjected to discrimination based on race, national origin, religion, sex, sexual orientation, gender identity, or disability.

§343.370. Prohibited Supervision.

Residents shall not be subjected to supervision and control by other residents.

§343.372. Work by Residents.

(a) Residents may be required to perform the following types of work responsibilities without monetary compensation:

(1) assignments which are part of a formalized vocational training curriculum;

(2) tasks performed as a community service pursuant to a juvenile court order; and

(3) routine housekeeping chores which are shared by all youth in the facility, including general facility maintenance.

(b) Residents shall not be permitted to perform any work prohibited by state or federal regulations pertaining to child labor.

(c) Repetitive, purposeless, or degrading make-work is prohibited.

(d) A resident's work assignments shall be excused or temporarily suspended if medically contra-indicated.

(e) Residents shall be provided with the necessary supervision, appropriate tools, cleaning implements, and clothing to safely and effectively complete their assignments.

(f) Residents shall not perform personal services for staff.

§343.374. Experimentation and Research Studies.

(a) Experimentation. Participation by residents in medical, psychological, pharmaceutical, or cosmetic experiments is prohibited.

(b) Research Studies. Participation by residents in medical, psychological, pharmaceutical, or cosmetic research is prohibited unless the research study is approved in writing by the juvenile board subject to the following guidelines:

(1) The juvenile board shall promulgate approved policies that govern all authorized research studies. Studies that include medically invasive procedures shall be prohibited.

(2) Approved research studies shall adhere to all applicable policies of the authorizing juvenile board.

(3) Research studies approved by the juvenile board shall be reported to the Commission in a format prescribed by the Commission prior to the commencement of the study.

(4) The results of the study shall be made available to the Commission upon request from the facility administrator, chief administrative officer, or juvenile board.

(5) Policies governing research studies shall adhere to all federal requirements governing human subjects and confidentiality.

§343.376. Resident Grievance Process.

Written policies and procedures, as well as actual practices shall demonstrate that there is a formalized grievance process to address residents' complaints about their treatment and facility services. At a minimum, the formalized grievance process shall include the following policy, procedural, and practice elements:

(1) Residents' ability to submit a grievance with full access to the process;

(2) A written response and resolution to all complaints:

(A) shall be resolved no later than ten calendar days from the date the grievance is received by pre-adjudication staff; or

(B) shall be resolved no later than 30 calendar days from the date the grievance is received by post-adjudication staff;

(3) Confidentiality of grievance without fear of reprisal;

(4) The designation of staff(s) as grievance officer(s);

(5) At least one level of appeal to an administrative-level staff person or to an administrative-level appeals board or panel;

(6) The resident's ability to participate in the resolution of a grievance, including the use of an intermediary and the ability to request witnesses;

(7) Periodic formal reviews of the grievance process and dispositions by administrative-level staff;

(8) A tracking system and grievance log that accounts for all grievances submitted; and

(9) Unresolved grievances submitted by any resident who is released shall be forwarded to the facility administrator or designee to determine if any action is needed.

§343.378. Grievance Appeals.

(a) The appeal shall be decided in a timely manner after receipt.

(b) The resident shall promptly be notified in writing of the resolution.

§343.380. Grievance Officer.

The duties of a grievance officer shall include:

(1) the maintenance of a current grievance log;

- (2) the daily collection of grievances;
- (3) responding to the resident after receiving the grievance;
- (4) providing a written resolution to the resident; and
- (5) forwarding all appeals to the administrative staff responsible for determining appeals.

§343.382. Grievance Form.

The grievance form shall contain the following elements:

- (1) the name of the resident;
- (2) the housing unit or cell;
- (3) the date of the grievance;
- (4) the grievance tracking identification;
- (5) the nature or description of the grievance;
- (6) the date and time of receipt;
- (7) the name and title of the person receiving the grievance;
- (8) the response or resolution to the grievance;
- (9) the date and time of the response;
- (10) the name and title of the person responding to the grievance; and
- (11) a space for a written request to appeal the grievance response.

§343.384. Religious Services.

Residents shall not be required to participate in religious services and religious counseling.

§343.386. Volunteers and Interns.

Facilities utilizing a volunteer or internship program shall have written policies and procedures that contain the following components:

- (1) a description of the authority, responsibility, and accountability of volunteers and interns who work with the department;
- (2) the selection and termination criteria, including disqualification based on specified criminal history;
- (3) the orientation and training requirements, including training on recognizing and reporting abuse, neglect, and exploitation;
- (4) a requirement that volunteers and interns meet minimum professional requirements if applicable; and
- (5) a written volunteer and intern registry, log or other documentation that details all dates and times a volunteer or intern is present on the premises of the facility as well as the purpose of their visit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6822



SUBCHAPTER C. SECURE PRE-ADJUDICATION DETENTION FACILITY STANDARDS

37 TAC §§343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414, 343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448, 343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, 343.498

These standards are proposed under §141.042 of the Texas Human Resources Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§343.400. Intake and Admission.

(a) Intake. An intake officer authorized by the juvenile board shall be on duty at the facility or on-call 24 hours a day.

(b) Pre-Admission Assessment. Each facility shall have written policies and procedures addressing the admission of juveniles who are in need of emergency medical care due to injury, illness, or intoxication or who are in need of emergency mental health services.

(1) Anyone presented for admission into detention and is in need of emergency medical care due to injury, illness, or intoxication, or is in need of mental health intervention, shall not be admitted into detention.

(2) The referring person shall be directed to a health care facility to have the individual evaluated and treated.

(c) Subsequent admission into detention is contingent upon written medical clearance provided by a health care or mental health professional.

(d) Intoxicated or Chemically-Impaired Individuals. Each facility shall have written policies and procedures addressing intoxicated or chemically-impaired juveniles being admitted into detention and their need for specialized supervision.

(e) Intoxicated or chemically-impaired individuals who have been medically cleared for admission should be placed under medical isolation in accordance with §343.338 of this chapter.

(f) A juvenile who has been taken into custody by law enforcement and presented for detention at a secure pre-adjudication detention facility shall:

- (1) not be left unsupervised; and
- (2) be admitted into detention immediately but no later than six hours from the time of entry.

§343.402. Intake Assessment Period.

(a) Residents shall be assigned to the general program as soon as possible after admittance into the facility.

(b) Assessment isolation for periods of time longer than necessary to assess the risks and needs of a resident is prohibited. Assessment isolation shall not exceed 24 hours.

(c) If a resident is confined in his or her room at admission for assessment purposes, juvenile supervision officers shall document the

assessment of the resident during this 24-hour period and retain this documentation in the resident's file.

(d) A juvenile supervision officer shall personally observe and record the behavior of a resident during the assessment period at random intervals not to exceed 15 minutes.

§343.404. Mental Health Screening and Referral.

(a) Mental Health Screening. The standard screening instrument shall be administered to each resident that is admitted into detention within 48 hours.

(b) Positive screening and mental health referral. A resident who scores a positive screening on the standard screening instrument shall be:

(1) administered a secondary screening immediately to assist in clarifying the resident's need for mental health intervention;

(A) If the secondary screening confirms the positive screening and that mental health intervention is warranted, then a referral shall be made to a mental health professional or licensed physician within 48 hours.

(B) If the secondary screening substantiates that the initial positive screening was false, then no further mental health intervention is required; or

(2) referred to a qualified mental health professional for consultation by the end of the following workday to determine if further intervention is warranted.

(A) The facility shall maintain documentation of the consultation in the resident's file.

(B) If the qualified mental health professional recommends that further mental health intervention is needed, then the resident must be referred to a mental health professional or a licensed physician within 48 hours.

(c) Documentation of recommendations or referrals specific to the juvenile's positive screening on the standard screening instrument shall be forwarded to the supervising juvenile probation officer if the juvenile is released at any point during the proceedings initiated in subsection (b)(1) and (2) of this section. If the juvenile is released and no further juvenile justice intervention is required, then the documentation shall be forwarded to the juvenile's parent, legal guardian, or custodian.

(d) Documentation of referrals, completed assessments and evaluations, including dates and times, shall be retained in the juvenile's file and forwarded to the supervising juvenile probation officer.

§343.406. Health Screening and Assessment.

(a) Health Screening. A health screening shall be conducted on each resident within two hours of admission by either a health care professional or an individual who has received specific training on administering the facility's health screening. The health screening instrument shall include:

(1) mental health problems;

(2) suicide risk assessment in accordance with the facility's suicide prevention plan;

(3) current state of health including:

(A) allergies;

(B) tuberculosis;

(C) other chronic conditions;

(D) sexually transmitted diseases;

(E) other infectious diseases;

(F) history of gynecological problems or pregnancies;

and

(G) recent injuries at or near the time of arrest;

(4) current use of medication including type, dosage, and prescribing physician;

(5) visual observation of teeth and gums and notation of any obvious dental problems;

(6) vision problems;

(7) drug and alcohol use;

(8) physical or developmental disabilities;

(9) evidence of physical trauma;

(10) a determination of the need for medical detoxification from alcohol or other substances or mental health services; and

(11) the resident's weight.

(b) Referral for Assessment. If the health screening indicates that a resident is in need of further medical evaluation, the resident shall be referred to a health care professional for further assessment within 24 hours, excluding holidays and weekends, from the date and time of the completed screening.

(c) Mandatory Health Assessment. If a resident has not had a health assessment by a health care professional within the last 12 months immediately preceding admission into the facility, the resident shall be given a health assessment by a health care professional within 30 calendar days after admission into the facility.

(d) Results of Screening and Assessment. The results of the health screening and health assessment shall be communicated to appropriate staff.

(e) Contagious or Infectious Disease. Any finding of the health screening that indicates a significant potential health risk to the staff or residents from a contagious or infectious disease shall be immediately reported to the facility administrator or the acting facility administrator, and the affected resident shall be placed in medical isolation until proper medical clearance is obtained.

§343.408. Personal Hygiene.

Residents shall be required to surrender their clothing and to shower upon admission into the facility.

§343.410. Personal Property.

A resident's personal property shall be collected, inventoried, and securely stored while the resident is housed in the facility. Documentation that is signed by the resident and the juvenile supervision officer shall be maintained in the resident's file.

§343.412. Orientation.

(a) Each resident shall be provided a verbal orientation within 12 hours of admission into the facility.

(b) The verbal orientation shall include an explanation of the facility's:

(1) procedures to access health care and services available;

(2) program rules with corresponding and maximum disciplinary sanctions;

(3) grievance policies and procedures;

(4) procedures to access mental health care and services available; and

(5) information required by the Prison Rape Elimination Act of 2003 including:

- (A) prevention and intervention;
- (B) methods of minimizing risk of sexual abuse;
- (C) reporting sexual abuse and assault; and
- (D) treatment and counseling;

(6) information regarding the reporting of suspected abuse, neglect, or exploitation of a child in a juvenile justice facility; and

(7) policy that states the resident is ensured the right of confidentiality with regard to the items included in paragraphs (3), (5) and (6) of this subsection and will not face reprisal for participating in the procedures included in these items.

(c) If the resident is not sufficiently fluent in English, arrangements shall be made to provide the resident with an orientation in the resident's primary language within 48 hours of admission.

(d) When a literacy problem prevents a resident from understanding written rules, a staff member or translator shall assist the resident within 48 hours of admission.

(e) Each resident shall be provided a written copy of the orientation materials upon completion of the orientation process.

§343.414. Behavioral Screening.

Prior to placing a resident into a housing unit, the resident shall be screened for potential vulnerabilities or tendencies of acting out with sexually aggressive or assaultive behavior. Housing assignments shall be made accordingly.

§343.416. Classification Plan.

All facilities with more than one housing unit shall have a classification plan that takes, at least, the following into account:

- (1) age;
- (2) sex;
- (3) offense;
- (4) behavior; and
- (5) any other special considerations including a resident's potential vulnerabilities for sexual abuse that are discovered during the resident's behavioral health screening.

§343.418. Admission Records.

The facility shall have the following information which shall be obtained at the time the resident is admitted into the facility:

- (1) date and time of entry;
- (2) date and time of admission;
- (3) name;
- (4) nicknames and aliases;
- (5) social security number;
- (6) current address;
- (7) detention criteria as required by §53.02(b) of the Texas Family Code;
- (8) referring offense;
- (9) name of attorney;
- (10) name, title, and signature of delivering individual;
- (11) gender;

(12) race;

(13) date of birth;

(14) place of birth;

(15) citizenship;

(16) current education level;

(17) last school attended;

(18) name, relationship, address, and phone number of parents, legal guardians, or custodians; and

(19) primary language of the resident and the resident's parent, legal guardian, or custodian.

§343.420. Format and Maintenance of Records.

(a) Resident records shall be maintained in a uniform format for identifying and separating files.

(b) Each facility shall have written policies and procedures to ensure the confidentiality of resident files.

§343.422. Content of Resident Records.

Each resident's record shall include the following:

- (1) the offense narrative, arrest warrant, or directive to apprehend;
- (2) the inventory of cash and property surrendered;
- (3) the list of approved visitors;
- (4) the name of the assigned probation officer;
- (5) the behavioral record, including any special incidents, discipline, or grievances;
- (6) the referrals to other agencies; and
- (7) the final release or transfer report.

§343.424. Housing Records.

For each housing unit in the facility, the following documentation shall be maintained:

- (1) a daily chronological log or electronic record documenting the resident's or housing unit's activity that identifies the juvenile supervision officers supervising the residents;
- (2) a daily report of admissions and releases; and
- (3) a population roster compiled as of 5:00 a.m. each day that shall include at a minimum:
 - (A) the date and time the roster was compiled;
 - (B) the name of all residents in the facility;
 - (C) the sex of all residents in the facility;
 - (D) the housing assignment location (e.g., the location where the resident sleeps) of all residents in the facility; and
 - (E) the numerical total of the resident population for each day.

§343.426. Release Procedures.

Prior to the release of a resident from the facility, the authorized officer shall:

- (1) verify the identity of the person receiving custody;
- (2) verify the release authorization documents;
- (3) secure a signed release by the individual receiving the resident's personal property;

(4) provide information to a parent, legal guardian, or custodian regarding;

(A) all medication prescribed while the resident was in the facility that the resident is currently taking, and the name and contact information of the prescribing physician;

(B) any pending medical, mental health, or dental appointments; and

(C) any present concerns regarding the resident; and

(5) secure a receipt signed by the person receiving custody.

§343.428. Resident Supervision.

A juvenile supervision officer may provide resident supervision if they:

(1) are currently certified as a juvenile supervision officer;
or

(2) have been employed by the facility less than 180 calendar days;

(A) have passed the competency evaluation exam as detailed in Chapter 344 of this title; and

(B) have completed a minimum of 40 hours of training, which shall include the mandatory topics as outlined in Chapter 344 of this title, as well as certification in CPR, first aid, and a personal restraint technique approved by the Commission.

§343.430. Minimum Facility Supervision.

At least two juvenile supervision officers shall be on duty at any time the facility has a resident. At least one of the officers shall be certified.

§343.432. Gender Supervision Requirement.

(a) If residents of both genders are housed within the facility, juvenile supervision officers of both genders shall be on duty and available to the residents for every shift.

(b) A juvenile supervision officer of one gender shall be prohibited from supervising and visually observing a resident of the opposite gender during showers, physical searches (i.e., strip searches), disrobing of residents (suicidal or not), or when personal hygiene practice (i.e., onset of menstrual cycle, etc.) requires the presence of a juvenile supervision officer of the same gender.

(c) Juvenile supervision officers of one gender shall be the sole supervisors of residents of the same gender during showers, physical searches, pat downs, disrobing of suicidal youth, or during other times in which personal hygiene practices or needs would require the presence of a juvenile supervision officer of the same gender.

§343.434. Facility-Wide Ratio.

The facility-wide juvenile supervision officer-to-resident ratio shall not be less than:

(1) one juvenile supervision officer to every eight residents during program hours; and

(2) one juvenile supervision officer to every 18 residents during non-program hours.

§343.436. Supervision Ratio--SOHU.

In a SOHU, the juvenile supervision officer-to-resident ratio shall not be less than:

(1) one juvenile supervision officer to every 12 residents during program hours; and

(2) one juvenile supervision officer to every 24 residents during non-program hours.

§343.438. Level of Supervision--SOHU.

(a) Program Hours. While residents are located in a SOHU, they shall be in constant physical presence of a juvenile supervision officer unless they are placed in their individual sleeping quarters during shift change, in which case, a juvenile supervision officer shall observe and document each resident's behavior at random intervals not to exceed 15 minutes.

(b) Non-Program Hours. During non-program hours, in a SOHU, a juvenile supervision officer shall visually observe each resident at random intervals not to exceed 15 minutes.

(c) Juvenile supervision officers shall document each visual observation made. The documentation shall include the time of the observation and generally describe the resident's behavior.

§343.440. Supervision Ratio--MOHU.

MOHUs shall maintain a juvenile supervision officer to resident ratio of no less than one juvenile supervision officer to every eight residents in the housing unit.

§343.442. Level of Supervision--MOHU.

(a) For MOHUs designed and operated after June 5, 2001, during program and non-program hours, residents, while physically located in a MOHU, shall be under the constant visual observation of a juvenile supervision officer.

(b) If juvenile supervision officers supervise residents behind an architectural barrier, the barrier shall provide a complete and unobstructed view of the entire multiple occupancy housing unit. The barrier, with or without the assistance of an electronic device, shall allow for constant auditory monitoring of the unit.

(c) Juvenile supervision officers shall document general observations of dorm activity at intervals not to exceed 30 minutes.

§343.444. Supervision On and Off Premises of Facility.

(a) On-Premises Supervision. Subject to §343.436 of this chapter, residents participating in any programming or activities on the facility premises, but outside of a single or multiple occupancy housing unit, shall be in the constant physical presence of a juvenile supervision officer at all times.

(b) Required Ratio. There shall be at least one juvenile supervision officer to every 12 residents participating in the program or activity.

(c) Off-Premises Supervision. A facility shall have written policies and procedures that establish specific resident supervision practices for residents allowed to temporarily leave the secure confines of the facility or the facility's secure grounds. The policies and procedures shall minimally include:

(1) designations of which staff may supervise youth off-premises;

(2) gender-specific requirements;

(3) staff-to-resident ratios when more than one resident is involved;

(4) personnel authorized to use approved restraint practices; and

(5) staff training requirements.

(d) The established policies and procedures shall be written to adequately provide an appropriate level of protection for the public and involved staff and residents.

(e) Exceptions. This standard does not apply to furlough and formal discharge.

(f) If a juvenile probation officer transports a resident off the facility premises, the juvenile probation officer must be currently certified in CPR, First Aid and, if authorized to use, a Commission-approved personal restraint technique.

§343.446. Exceptions to General Levels of Supervision.

A resident shall be in the constant physical presence of a juvenile supervision officer with exception of the following:

(1) Small Groups. No more than three residents may be supervised by a professional when the professional is working with the residents in a capacity that relates to the professional's licensure, certification, professional training, or education.

(2) Small Therapeutic Groups. A juvenile supervision officer shall provide constant visual supervision of any small group between four and eight residents when those residents are working with a licensed or certified mental health professional as defined by §343.100(32) of this chapter.

(3) Visitation. Private visitation between one resident and an attorney, authorized visitor, or clergy does not require the constant physical presence of a juvenile supervision officer.

§343.448. Primary Control Room.

A juvenile supervision officer stationed in and assigned to the facility's primary control room(s) shall not count toward meeting any required ratios prescribed by this subchapter.

§343.450. Single Occupancy Housing Units--SOHU.

(a) SOHUs shall be constructed to contain no more than 24 beds in each housing unit.

(b) Individual resident sleeping quarters shall be utilized as single occupancy only; and, at no time, may more than one resident be placed in an individual resident sleeping quarter.

(c) Individual resident sleeping quarters shall contain a bed above floor level.

§343.452. Spatial Requirements--SOHU.

(a) Individual resident sleeping quarters shall have a minimum ceiling height of 7.5 feet.

(b) Individual resident sleeping quarters shall have a minimum of 60 square feet of floor space.

§343.454. Shower Facilities--SOHU.

All SOHUs shall contain at least one operable shower with hot and cold running water for every ten beds in the housing unit.

§343.456. Toilet Facilities--SOHU.

All SOHUs shall contain at least one operable toilet above floor level for every 12 beds in male housing units and one for every eight beds in female housing units.

(1) For facilities constructed after March 1, 1996, the ratio shall be one toilet for every six beds in the housing unit.

(2) Urinals may be substituted for up to one-half of the toilets in housing units permanently designed as all-male units.

§343.458. Washbasin Requirements--SOHU.

All SOHUs constructed and in operation on or after September 1, 2003, shall contain a washbasin with hot and cold running water.

§343.460. Drinking Fountain--SOHU.

All SOHUs shall contain a drinking fountain.

§343.462. Pre-Assignment Screening Process--MOHU.

Residents shall not be admitted into MOHUs directly from the intake process. Classification, screening, and behavioral observation shall occur for at least 72 hours before the decision is made to admit the resident into a MOHU.

§343.464. Administrative Approval--MOHU.

The placement of any resident into a MOHU shall be approved by the facility administrator or the acting facility administrator.

§343.468. Classification Plan--MOHU.

Facilities with multiple occupancy housing units shall have a written classification plan that determines how residents are grouped in housing units. Residents shall, at a minimum, be classified for grouping by age and sex.

§343.470. Eligibility Criteria--MOHU.

(a) A formalized (e.g., written) and objective (e.g., scored and weighted) classification assessment shall be completed prior to a resident being assigned to a MOHU. The classification assessment process shall minimally include a review and weighting of the following criteria:

(1) Physical health--A review of all available health documentation in the facility staffs' possession with an emphasis on assessing any diagnosed or suspected infectious or contagious diseases;

(2) Mental health--A review of all available mental health documentation in the facility staffs' possession with an emphasis on assessing mental health or mental illness diagnoses that could be exacerbated by, or that would not be conducive to, multiple occupancy housing settings;

(3) Sexual behavior--An assessment of the resident's potential to be sexually abused by other residents and his or her potential to be sexually abusive;

(4) Aggressive or assaultive behaviors--An assessment of resident's history of, or propensity for, aggressive (both verbal and physical) and assaultive behaviors. This assessment shall minimally include a review of the resident's formal referral history (both alleged and disposed charges) as well as institutional behavior records;

(5) Susceptibility to acts of peer abuse, harassment, and exploitation--This shall minimally include an assessment of a resident's physical stature, emotional maturity, enemies of record, and social functioning information;

(6) Institutional behavior or discipline records--This assessment shall include a review of a resident's behavior records for the current term of detention as well as any available behavior records from previous institutional custody periods provided by the assessing jurisdiction; and

(7) Special needs or circumstances that may compromise the resident's, or other MOHU residents', physical safety and successful service delivery processes.

(b) The completed classification assessment document shall include an objective assessment score or recommendation for or against a MOHU assignment, the date the assessment process was completed, the signature of the person completing the assessment, and the signature of the supervisory-level staff that reviewed and approved the assessment.

§343.472. Multiple Occupancy Housing Units--MOHU.

(a) The utilization of MOHUs shall have prior written approval and authorization from the governing board of the facility.

(b) Sections 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480 and 343.482 of this chapter apply only to MOHUs designed and operating as such on or after June 5, 2001.

(c) MOHUs shall be designed to contain no more than eight beds in each housing unit.

(d) The capacity of MOHUs shall not exceed 25 percent of the design capacity of the facility.

(e) MOHUs shall have one bed above floor level for every resident assigned to the unit.

(f) MOHUs shall contain residents of the same sex.

§343.474. Spatial Requirements--MOHU.

(a) MOHUs shall have a minimum ceiling height of 7.5 feet.

(b) MOHUs shall have a minimum of 35 square feet of unencumbered floor space per bed in the housing unit.

§343.476. Shower Facilities--MOHU.

All MOHUs shall contain at least one operable shower with hot and cold running water for every eight beds in the housing unit.

§343.478. Toilet Facilities--MOHU.

All MOHUs shall contain at least one operable toilet above floor level for every four beds in the housing unit.

§343.480. Washbasin Requirements--MOHU.

All MOHUs shall contain at least one washbasin with hot and cold running water.

§343.482. Drinking Fountain--MOHU.

All MOHUs shall contain a drinking fountain.

§343.484. Exercise and Common Activity Areas.

(a) Exercise Area. The facility shall provide space for an exercise area.

(b) Common Activity Area. The facility's total common activity area shall encompass no less than 100 square feet of floor space per resident.

§343.486. Program Hours.

Each facility shall have a daily written program schedule outlining the stated activities during program hours.

(1) Each resident shall be provided a minimum of ten hours of structured and unstructured activities.

(2) Exceptions. Residents who are in disciplinary seclusion, room restriction, protective isolation, medical isolation, or assessment isolation may receive modification to their respective program schedule.

(3) The facility shall maintain documentation of any program schedule deviation or modification.

§343.488. Educational Program.

(a) The facility administrator shall ensure that there is an educational program that requires all residents to participate. The educational program provided shall be administered in accordance with rules adopted by the Texas Education Agency (TEA).

(b) The facility administrator shall ensure that the education provider has access to residents so that the educational program is afforded to all residents, in accordance with rules adopted by the TEA.

§343.489. Educational Curriculum.

Students shall be provided coursework that is aligned with the Texas Essential Knowledge and Skills, in accordance with rules adopted by the TEA.

§343.490. Instructional Days.

The facility administrator shall ensure that the educational program provides for at least 180 days of instruction unless a waiver has been granted by the TEA for fewer days or the number of educational days coincides with the local school district calendar.

§343.491. Special Education.

(a) The facility administrator, through a cooperative effort with the Local Education Agency (LEA), will ensure that residents with disabilities are provided a free and appropriate public education as determined by the Admission, Review and Dismissal committee in order to meet the individual educational needs of the student as defined by federal and state laws.

(b) The facility administrator, through a cooperative effort with the Local Education Agency (LEA), will ensure that residents with disabilities have available an instructional day commensurate with that of students without disabilities, in accordance with requirements contained in 19 TAC §89.1075(d).

(c) The facility administrator or designee shall send notification of a student placement in a residential facility to the LEA as required by §29.012 of the Texas Education Code and shall retain documentation of this notice.

§343.492. Educational Space.

The facility administrator shall ensure that educational space is adequate to meet the instructional requirements for each resident.

§343.493. Educational Staff Safety.

All permanent educational staff, excluding temporary substitutes, shall receive a facility orientation prior to performing instructional duties. Orientation shall include:

- (1) security procedures;
- (2) emergency procedures;
- (3) behavior management system and prohibited sanctions;

and

- (4) reporting abuse, neglect and exploitation.

§343.494. Supervision During Educational Program.

Educational staff shall not be counted in staff-to-resident ratios.

§343.496. Reading Materials.

Age-appropriate reading materials shall be available to all residents.

§343.498. Recreation and Exercise.

(a) Supplies. Recreational equipment and supplies shall be provided to the residents.

(b) The recreational schedule shall offer the following programming:

- (1) Large Muscle Exercise. At least one hour of large muscle exercise shall be scheduled each day.
- (2) Open Recreational Activity. At least one hour of open recreational activity shall be scheduled each day.

(c) Exceptions. A resident's recreational schedule may be altered under the following conditions:

- (1) participation by the resident is contra-indicated for medical reasons;

(2) the resident is in disciplinary seclusion, room restriction, protective isolation, medical isolation, or assessment isolation;

(3) the resident has a scheduled appointment;

(4) extenuating circumstances exist that impede the recreational schedule; or

(5) the resident presents an imminent danger to self or others. Utilization of this provision shall require the written approval of the facility administrator or the acting facility administrator.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6822



SUBCHAPTER D. SECURE POST-ADJUDICATION CORRECTIONAL FACILITY STANDARDS

37 TAC §§343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, 343.712

These standards are proposed under §141.042 of the Texas Human Resources Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§343.600. Required Pre-Admission Records.

Prior to a resident's admission, the facility shall receive the following from the referring agency:

(1) a completed State of Texas Common Application Form, except when the facility is operated by the referring agency;

(2) a psychological evaluation, or behavioral health assessment (as defined in the CRM), completed within 365 calendar days prior to the resident's admission date;

(3) a signed disposition order or TYC commitment order;

(4) a current immunization record;

(5) a medical examination that was completed within 30 calendar days prior to the resident's admission date;

(6) documentation that a tuberculosis test was administered and results were received no more than 365 calendar days prior to the resident's admission date;

(7) a dental evaluation that was completed within 30 calendar days prior to the resident's admission date;

(8) services needed for the disabled;

(9) primary language of the resident and the resident's parent, legal guardian or custodian; and

(10) school records.

§343.602. Intake and Admission.

(a) Pre-Admission Assessment. Each facility shall have written policies and procedures addressing the admission of juveniles who are in need of emergency medical care due to injury, illness, or intoxication or who are in need of mental health services.

(1) Anyone presented for admission into the facility and is in need of emergency medical care due to injury, illness, or intoxication or is in need of mental health intervention shall not be admitted into the facility.

(2) The referring person shall be directed to a health care facility to have the individual evaluated and treated.

(3) Subsequent admission into the facility is contingent upon written medical clearance provided by a health care or mental health professional.

(b) Intoxicated or Chemically-Impaired Individuals. Each facility shall have written policies and procedures addressing intoxicated or chemically-impaired juveniles being admitted into the facility and their need for specialized supervision.

(c) Intoxicated or chemically-impaired individuals who have been medically cleared for admission should be placed under medical isolation in accordance with §343.338 of this chapter.

§343.604. Health Screening and Assessment.

(a) Health Screening. A health screening shall be conducted on each resident within two hours of admission by either a health care professional or an individual who has received specific training on administering the facility's health screening. The health screening instrument shall include:

(1) mental health problems;

(2) suicide risk in accordance with the facility's suicide prevention plan's screening methodology;

(3) current state of health including:

(A) allergies;

(B) tuberculosis;

(C) other chronic conditions;

(D) sexually transmitted diseases;

(E) other infectious diseases; and

(F) history of gynecological problems or pregnancies;

(4) current use of medication including type, dosage, and prescribing physician;

(5) visual observation of teeth and gums and notation of any obvious dental problems;

(6) vision problems;

(7) drug and alcohol use;

(8) physical and developmental disabilities;

(9) evidence of physical trauma; and

(10) a determination of the need for medical detoxification from alcohol or other substances or mental health intervention.

(b) Referral for Assessment. If the health screening indicates that a resident is in need of further medical evaluation, the resident shall be referred to a health care professional for further assessment within 24 hours, excluding holidays and weekends, from the date and time of the completed screening.

(c) Results of Screening and Assessment. The results of the health screening and health assessment shall be communicated to appropriate staff.

(d) Contagious or Infectious Disease. Any finding of the health screening that indicates a significant potential health risk to the staff or residents from a contagious or infectious disease shall be reported immediately to the facility administrator or the acting facility administrator, and the affected resident shall be placed in medical isolation until proper medical clearance is obtained.

(e) Intra-Jurisdictional Custodial Transfer. For intra-jurisdictional custodial transfer of residents, the only items required for the health screening at admission into a post-adjudication secure correctional facility are items enumerated in subsection (a)(2) and (9) of this section.

§343.606. Orientation.

(a) Each resident shall be provided a verbal orientation within 12 hours of admission into the facility.

(b) The verbal orientation shall include an explanation of the facility's:

- (1) procedures to access health care and services available;
- (2) program rules with corresponding and maximum disciplinary sanctions;
- (3) grievance policies and procedures;
- (4) procedures to access mental health care and services available; and
- (5) information required by the Prison Rape Elimination Act of 2003 including:
 - (A) prevention and intervention;
 - (B) methods for minimizing risk of sexual abuse;
 - (C) reporting sexual abuse and assault; and
 - (D) treatment and counseling;

(6) information regarding the reporting of suspected abuse, neglect, or exploitation of a child in a juvenile justice facility; and

(7) information stating that the resident is ensured the right of confidentiality with regard to the items included in paragraphs (3), (5), and (6) of this subsection and will not face reprisal for participating in the procedures included in these items.

(c) If the resident is not sufficiently fluent in English, arrangements shall be made to provide the resident with an orientation in the resident's primary language within 48 hours of admission.

(d) When a literacy problem prevents a resident from understanding written rules, a staff member or translator shall assist the resident within 48 hours.

(e) Each resident shall be provided a written copy of the orientation materials upon completion of the orientation process.

§343.608. Classification Plan.

All facilities with more than one housing unit shall have a classification plan that takes into account at least the following:

- (1) age;
- (2) sex;
- (3) offense;
- (4) behavior; and
- (5) any other special considerations including a resident's potential vulnerabilities for sexual abuse that are discovered during the resident's behavioral health screening.

§343.610. Classification Plan--Segregation.

The classification plan shall require that residents assigned to progressive sanctions level 5 and below be physically segregated from residents assigned to progressive sanctions levels 6 and 7.

§343.612. Admission Records.

The facility shall obtain and record the following information at the time the resident is admitted into the facility:

- (1) date and time of admission;
- (2) name;
- (3) nicknames and aliases;
- (4) social security number;
- (5) last known address;
- (6) adjudicated offense;
- (7) name of attorney;
- (8) name, title, and signature of delivering individual;
- (9) gender;
- (10) race;
- (11) date of birth;
- (12) citizenship;
- (13) place of birth;
- (14) name, relationship, address, and phone number of parents, legal guardians, or custodians; and
- (15) primary language of resident and resident's parent, legal guardian, or custodian.

§343.614. Format and Maintenance of Records.

(a) Resident records shall be maintained in a uniform format for identifying and separating files.

(b) Each facility shall have written policies and procedures to ensure the confidentiality of resident files.

§343.616. Content of Resident Records.

Each resident's record shall include the following:

- (1) delinquent history;
- (2) inventory of cash and property surrendered;
- (3) list of approved visitors;
- (4) name of the assigned probation officer;
- (5) behavioral record, including any special incidents, discipline, or grievances;
- (6) progress reports; and

- (7) final release and transfer report.

§343.618. Housing Records.

For each housing unit in the facility, the following documentation shall be maintained:

(1) a daily chronological log or electronic record documenting the resident's or housing unit's activity that identifies the juvenile supervision officers supervising the residents;

(2) a daily report of admissions and releases; and

(3) a population roster compiled as of 5:00 a.m. each day that shall include, at a minimum:

(A) the date and time the roster was compiled;

(B) the name of all residents in the facility;

(C) the sex of all residents in the facility;

(D) the housing assignment location (i.e., the location where the resident sleeps) of all residents in the facility; and

(E) the numerical total of the resident population for each day.

§343.620. Release Procedures.

Prior to the release of each resident from the facility, the authorized officer shall:

(1) verify the identity of the person receiving custody;

(2) verify the release authorization documents;

(3) secure a signed release by the individual receiving the resident's personal property;

(4) provide information to a parent, legal guardian, or custodian regarding:

(A) all medication prescribed while the resident was in the facility that the resident is currently taking, and the name and contact information of the prescribing physician;

(B) any pending medical, mental health, or dental appointments; and

(C) any present concerns regarding the resident;

(5) secure a receipt signed by person receiving custody.

§343.622. Resident Supervision.

A juvenile supervision officer may provide resident supervision if they:

(1) are currently certified as a juvenile supervision officer;
or

(2) have been employed by the facility less than 180 calendar days;

(A) have passed the competency evaluation exam as detailed in Chapter 344 of this title; and

(B) have completed a minimum of 40 hours of training, which shall include the mandatory topics as outlined in Chapter 344 of this title as well as certification in CPR, first aid, and a personal restraint technique approved by the Commission.

§343.624. Minimum Facility Supervision.

At least two juvenile supervision officers shall be on duty at any time the facility has a resident. At least one of the officers shall be certified.

§343.626. Gender Supervision Requirement.

(a) If residents of both genders are housed within the facility, juvenile supervision officers of both genders shall be on duty and available to the residents for every shift.

(b) A juvenile supervision officer of one gender shall be prohibited from supervising and visually observing a resident of the opposite gender during showers, physical searches (i.e., strip searches), disrobing of residents (suicidal or not) or when personal hygiene practice (e.g., onset of menstrual cycle, etc.) requires the presence of a juvenile supervision officer of the same gender.

(c) Juvenile supervision officers of one gender shall be the sole supervisors of residents of the same gender during showers, physical searches, pat downs, disrobing of suicidal youth, or during other times in which personal hygiene practices or needs would require the presence of a juvenile supervision officer of the same gender.

§343.628. Facility-Wide Ratio.

The facility-wide juvenile supervision officer-to-resident ratio shall not be less than:

(1) one juvenile supervision officer to every 8 residents during program hours;

(2) one juvenile supervision officer to every 20 residents during non-program hours; and

(3) one juvenile supervision officer to every 18 residents during non-program hours if a post-adjudication facility is located in the same building as a pre-adjudication facility.

§343.630. Supervision Ratio.

The juvenile supervision officer-to-resident ratio shall not be less than:

(1) one juvenile supervision officer to every 12 residents during program hours;

(2) one juvenile supervision officer to every 24 residents during non-program hours.

§343.632. Level of Supervision--SOHU.

(a) Program Hours. While residents are located in a SOHU, they shall be in constant physical presence of a juvenile supervision officer unless they are placed in their individual sleeping quarters during shift change, in which case, a juvenile supervision officer shall observe and document each resident's behavior at random intervals not to exceed 15 minutes.

(b) Non-Program Hours. During non-program hours, in a SOHU, a juvenile supervision officer shall visually observe each resident at random intervals not to exceed 15 minutes.

(c) Juvenile supervision officers shall document each visual observation made. The documentation shall include the time of the observation and generally describe the resident's behavior.

§343.634. Level of Supervision--MOHU.

(a) While physically located in a MOHU, residents shall be under the constant visual observation of a juvenile supervision officer during program and non-program hours.

(b) Juvenile supervision officers shall document general observations of dorm activity at intervals not to exceed 30 minutes.

§343.636. Supervision On and Off Premises of Facility.

(a) On-Premises Supervision. Subject to §343.628 of this chapter, residents participating in any programming or activities on the facility premises, but outside of a single or multiple occupancy housing unit, shall be in the constant physical presence of a juvenile supervision officer at all times.

(b) Required Ratio. There shall be at least one juvenile supervision officer to every 12 residents participating in the program or activity.

(c) Off-Premises Supervision. A facility shall have written policies and procedures that establish specific resident supervision practices for residents allowed to temporarily leave the secure confines of the facility or the facility's secure grounds. The policies and procedures shall minimally include:

- (1) applicable staff designations (i.e., which staff may supervise youth off site);
- (2) gender-specific requirements;
- (3) staff-to-resident ratios when more than one resident is involved;
- (4) personnel authorized to use approved restraint practices; and
- (5) staff training requirements.

(d) The established policies and procedures shall be written to adequately provide an appropriate level of protection for the public and involved staff and residents.

(e) Exceptions. This standard does not apply to furlough and formal discharge.

§343.638. Exceptions to General Levels of Supervision.

A resident shall be in the constant physical presence of a juvenile supervision officer with exception of the following:

(1) Small Groups. No more than three residents may be supervised by a professional when the professional is working with the residents in a capacity that relates to the professional's licensure, certification, professional training, or education.

(2) Small Therapeutic Groups. A juvenile supervision officer shall provide constant visual supervision of any small group between four and eight residents when those residents are working with a licensed or certified mental health professional as defined by §343.100(32) of this chapter.

(3) Visitation. Private visitation between one resident and an attorney, authorized visitor, or clergy does not require the constant physical presence of a juvenile supervision officer.

§343.640. Primary Control Room.

A juvenile supervision officer stationed in and assigned to the facility's primary control room(s) shall not count toward meeting any required ratios prescribed by this subchapter.

§343.642. Single Occupancy Housing Units--SOHU.

(a) SOHUs shall be constructed to contain no more than 24 beds in each housing unit.

(b) Individual resident sleeping quarters shall be utilized as single occupancy only; and at no time, may more than one resident be placed in an individual resident sleeping quarter.

(c) Individual resident sleeping quarters shall contain a bed above floor level.

§343.644. Spatial Requirements--SOHU.

(a) Individual resident sleeping quarters shall have a minimum ceiling height of 7.5 feet.

(b) Individual resident sleeping quarters shall have a minimum of 60 square feet of floor space.

§343.646. Shower Facilities--SOHU.

All SOHUs shall contain at least one operable shower with hot and cold running water for every ten beds in the housing unit.

§343.648. Toilet Facilities--SOHU.

All SOHUs shall contain at least one operable toilet above floor level for every 12 beds in male housing units and one for every eight beds in female housing units.

(1) For facilities constructed after March 1, 1996, the ratio shall be one toilet for every six beds in the housing unit.

(2) Urinals may be substituted for up to one-half of the toilets in housing units permanently designed as all-male units.

§343.650. Washbasin Requirements--SOHU.

All SOHUs constructed and in operation on or after September 1, 2003, shall contain a washbasin with hot and cold running water.

§343.652. Drinking Fountain--SOHU.

All SOHUs shall contain a drinking fountain.

§343.654. Multiple Occupancy Housing Units--MOHU.

(a) MOHUs shall be constructed to contain no more than 24 beds in each housing unit.

(b) MOHUs shall have one bed above floor level for every resident assigned to the unit.

(c) MOHUs shall contain residents of the same sex.

(d) If bunk beds are utilized, they shall not exceed two levels.

§343.656. Spatial Requirements--MOHU.

(a) MOHUs shall have a minimum ceiling height of 7.5 feet.

(b) MOHUs shall have a minimum of 35 square feet of unencumbered floor space per bed in the housing unit.

§343.658. Shower Facilities--MOHU.

All MOHUs shall contain at least one operable shower with hot and cold running water for every ten beds in the housing unit.

§343.660. Toilet Facilities--MOHU.

All MOHUs shall contain at least one operable toilet above floor level for every twelve beds in male housing units and one for every eight beds in female housing units.

(1) For facilities constructed after March 1, 1996, the ratio shall be one toilet for every six beds in the housing unit.

(2) Urinals may be substituted for up to one-half of the toilets in housing units permanently designed as all-male units.

§343.662. Washbasin Requirements--MOHU.

All MOHUs constructed and in operation on or after September 1, 2003, shall contain a washbasin with hot and cold running water.

§343.664. Drinking Fountain--MOHU.

All MOHUs shall contain a drinking fountain.

§343.666. Exercise and Day Room Areas.

(a) Exercise Areas. The facility shall provide an area for indoor and outdoor exercise.

(b) Day Rooms.

(1) Day rooms shall provide a minimum of 35 square feet of space for every resident using the day room at one time, excluding lavatories, showers, and toilets.

(2) Day rooms shall provide sufficient seating and writing surfaces for every resident using the day room at one time.

§343.668. Program Hours.

Each facility shall have a daily written program schedule outlining the stated activities during program hours.

(1) Each resident shall be provided a minimum of ten hours of structured and unstructured activities.

(2) Exceptions. Residents who are in disciplinary seclusion, room restriction, protective isolation, medical isolation, or assessment isolation may receive modification to their respective program schedule.

(3) The facility shall maintain documentation of any program schedule deviation or modification.

§343.670. Educational Program.

(a) The facility administrator shall ensure that there is an educational program that requires all residents to participate. The educational program provided shall be administered in accordance with rules adopted by the Texas Education Agency (TEA).

(b) The facility administrator shall ensure that the education provider has access to residents so that the educational program is afforded to all residents, in accordance with rules adopted by the TEA.

§343.671. Educational Curriculum.

Students shall be provided coursework that is aligned with the Texas Essential Knowledge and Skills, in accordance with rules adopted by the TEA.

§343.672. Instructional Days.

The facility administrator shall ensure that the educational program provides for at least 180 days of instruction unless a waiver has been granted by the TEA for fewer days or the number of educational days coincides with the local school district calendar.

§343.673. Special Education.

(a) The facility administrator, through a cooperative effort with the Local Education Agency (LEA), will ensure that residents with disabilities are provided a free and appropriate public education as determined by the Admission, Review and Dismissal committee in order to meet the individual educational needs of the student as defined by federal and state laws.

(b) The facility administrator, through a cooperative effort with the LEA, will ensure that residents with disabilities have available an instructional day commensurate with that of students without disabilities, in accordance with requirements contained in 19 TAC §89.1075(d).

(c) The facility administrator or designee shall send notification of a student placement in a residential facility to the LEA as required by §29.012 of the Texas Education Code and shall retain documentation of this notice.

§343.674. Educational Space.

The facility administrator shall ensure that educational space is adequate to meet the instructional requirements for each resident.

§343.675. Educational Staff Safety.

All permanent educational staff, excluding temporary substitutes, shall receive a facility orientation prior to performing instructional duties. Orientation shall include:

- (1) security procedures;
- (2) emergency procedures;
- (3) behavior management system and prohibited sanctions;
- and
- (4) reporting abuse, neglect and exploitation.

§343.676. Supervision During Educational Program.

Educational staff shall not be counted in staff-to-resident ratios.

§343.677. Vocational Training Program.

The facility administrator shall ensure that a vocational training program offered to residents, that is not administered by the school and through which no academic credit is gained, is administered by appropriately qualified persons to provide instruction or mentoring in the vocational skills.

§343.678. Reading Materials.

Age-appropriate reading materials shall be available to all residents.

§343.680. Recreation and Exercise.

(a) Supplies. Recreational equipment and supplies shall be provided for use by residents.

(b) The recreational schedule shall offer the following programming:

(1) Large Muscle Exercise. At least one hour of large muscle exercise shall be scheduled each day.

(2) Open Recreational Activity. At least one hour of open recreational activity shall be scheduled each day.

(c) Exceptions. A resident's recreational schedule may be altered under the following conditions:

(1) participation by the resident is contra-indicated for medical reasons;

(2) the resident is in disciplinary seclusion, room restriction, protective isolation, medical isolation, or assessment isolation;

(3) the resident has a scheduled appointment;

(4) extenuating circumstances exist that impede the recreational schedule; or

(5) the resident presents an imminent danger to self or others. Utilization of this provision shall require the written approval of the facility administrator or the acting facility administrator.

§343.686. Rehabilitative Services.

The social services program shall provide for the availability of:

(1) professional counseling services (individual and group);

(2) substance abuse prevention education; and

(3) HIV/AIDS prevention education.

§343.688. Residential Case Plan.

(a) The initial case plan shall be completed no later than 30 calendar days from the resident's date of placement.

(b) The case plan shall contain written documentation acknowledging that the plan was developed in consultation with the resident, the resident's parent, legal guardian, or custodian, and the supervising juvenile probation officer.

(c) The case plan shall contain specific goals for at least the following nine domains:

(1) medical and dental;

(2) safety and security;

(3) recreational;

(4) educational;

(5) mental and behavioral health;

(6) relationship;

- (7) socialization;
- (8) permanency; and
- (9) parent and child participation.

(d) The case plan shall be signed by the resident, the resident's parent, legal guardian, or custodian, the facility's designee and the supervising juvenile probation officer.

(e) The date of the facility designee's signature on the case plan shall be the case plan completion date.

(f) The case plan shall be retained in the resident's case file with written documentation verifying that copies were provided to the resident, the resident's parent, legal guardian, or custodian and the supervising juvenile probation officer.

§343.690. Residential Case Plan Review.

(a) Case plans shall be reviewed 90 calendar days from the date of completion of the initial case plan or case plan review and every 90 calendar days thereafter.

(b) The case plan review shall contain written documentation acknowledging that the review was conducted in consultation with the resident, the resident's parent, legal guardian or custodian, and the supervising juvenile probation officer.

(c) The case plan reviews shall measure the resident's progress toward meeting his/her goals using the six-point scale outlined in Title 1, Part 15, §351.13 of the Texas Administrative Code.

(d) The case plan review shall document any newly identified needs, goals, and interventions for the juvenile and the juvenile's family.

(e) The case plan review shall be signed by the resident, the resident's parent, legal guardian, or custodian, the facility's designee and the supervising juvenile probation officer.

(f) The date of the facility designee's signature on the case plan review shall be the case plan review completion date.

(g) The case plan review shall be retained in the resident's case file with written documentation verifying that copies were provided to the resident, the resident's parent, legal guardian, or custodian, and the supervising juvenile probation officer.

§343.700. Physical Training Program.

Sections 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, and 343.712 of this chapter apply to those facilities that have a physical training program.

§343.702. Governing Board Approval.

Facilities that utilize a physical training program shall have written authorization from the governing board prior to operation.

§343.704. Pre-Admission Requirements.

Prior to admitting a resident into the facility, the following documentation shall be reviewed by the facility administrator or designee:

(1) a medical release signed and dated by a physician approving the resident's participation in the facility's physical training program;

(2) the physician's acknowledgement of the components of the physical training program; and

(3) a psychological evaluation, or behavioral health assessment (as defined in the CRM), which should indicate in writing the appropriateness for the child's placement at the facility based on the needs and/or limitations of the child (i.e., mental illness, history of abuse, etc.).

§343.706. Physical Training Program Plan.

The facility shall have a written physical training program plan developed in consultation with the facility's health service authority and approved by the governing board. The plan shall include:

(1) a physical fitness screening tool that addresses whether the resident has the physical capability to fully participate in the physical training program. The tool shall be selected or developed by the facility administrator or designee;

(2) a curriculum that addresses the specific types of exercises authorized to be used within the program. The curriculum shall:

(A) define the time limitations of the individual exercises used in the physical training program; and

(B) define the set number of repetitions of each exercise per session;

(3) specific minimal criteria to determine when outdoor weather conditions are too extreme or dangerous for physical training. The criteria shall address scheduling changes when necessary to ensure the safety of residents (e.g., seasonal scheduling changes to accommodate for weather patterns);

(4) adjustments for increased dietary allowances in the residents' menu plan to accommodate the need for modified caloric intake and hydration; and

(5) protocols for removal from the program if a resident becomes unfit to participate in the physical training program due to medical or mental health reasons.

§343.708. Injury and Illness.

If a resident is, at any time, deemed unfit to participate in the physical training program due to medical reasons, to return the resident to the program, the facility must obtain a written release signed by a physician indicating that the resident is fit to resume program activities.

§343.710. Disciplinary Sanctions.

The facility shall have written policies and procedures, including guidelines, parameters, and limitations, on the types of physical activity that may be utilized for discipline or refocusing purposes (e.g., physical activities used to discipline for non-compliant behavior or as a substitute for write-ups or disciplinary seclusion).

§343.712. Physical Fitness Screening Tool.

(a) The resident shall not participate in the physical training program until the initial physical fitness screening tool has been completed and evaluated.

(b) Every 30 calendar days, the facility shall administer the physical fitness screening tool to re-evaluate the resident's ability to participate in the physical training program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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For further information, please call: (512) 424-6822



SUBCHAPTER E. RESTRAINTS

37 TAC §§343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816, 343.818

These standards are proposed under §141.042 of the Texas Human Resources Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§343.800. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless otherwise expressly defined in the chapter:

(1) Approved Personal Restraint Technique--A professionally trained, curriculum-based, and competency-based restraint technique that uses a person's physical exertion to completely or partially constrain another person's body movement without the use of mechanical restraints. Personal restraint techniques shall first be approved for use by the Commission.

(2) Approved Mechanical Restraint Devices--A professionally manufactured and commercially available mechanical device designed to aid in the restriction of a person's bodily movement. Mechanical restraint devices shall first be approved by the Commission. The following are Commission-approved mechanical restraint devices:

(A) Ankle Cuffs--A metal band designed to be fastened around the ankle to restrain free movement of the legs;

(B) Handcuffs--Metal devices designed to be fastened around the wrist to restrain free movement of the hands and arms;

(C) Plastic Cuffs--Plastic devices designed to be fastened around the wrists or legs to restrain free movement of hands, arms or legs;

(D) Restraint Bed--A professionally manufactured and commercially available bed, or integrated bed attachment(s), specifically designed to facilitate safe human restraint applications.

(E) Restraint Chair--A professionally manufactured and commercially available restraint apparatus specifically designed for safe human restraint. The device's design facilitates the almost complete immobilization of a subject in an upright sitting position by restricting the subject's extremities, upper leg area, and torso through the application of soft-restraints. The apparatus may be fixed or wheeled for re-location;

(F) Waist Belt--A cloth, leather, or metal band designed to be fastened around the waist used to secure the arms to the sides or front of the body; and

(G) Wristlets--A cloth or leather band designed to be fastened around the wrist, which may be secured to a waist belt or used in a non-ambulatory mechanical restraint.

(3) Chemical Restraint--The application of a chemical agent on a resident or residents.

(4) Four-Point Restraint--The use of approved mechanical restraint devices applied to each of a resident's wrists and ankles to secure a resident in a supine position to a restraint bed.

(5) Mechanical Restraint--The application of an approved mechanical restraint device which restricts or aids in the restriction of the movement of the whole or a portion of an individual's body to control physical activity.

(6) Non-Ambulatory Mechanical Restraint--A method of prohibiting a resident's ability to stand upright and walk with the use of a combination of approved mechanical restraint devices, cuffing techniques and the subject's body positioning. The four-point restraint and a restraint chair are examples of acceptable non-ambulatory mechanical restraints.

(7) Personal Restraint--The application of physical force alone, restricting the free movement of the whole or a portion of an individual's body to control physical activity.

(8) Physical Escort--Touching or holding a resident with a minimum use of force for the purpose of directing the resident's movement from one place to another. A physical escort is not considered a personal restraint.

(9) Protective Devices--Professionally manufactured devices used for the protection of residents or staff that do not restrict the movement of a resident. Protective devices are not considered mechanical restraint devices.

(10) Restraint--The application of an approved personal restraint technique, an approved mechanical restraint device, or a chemical restraint to an individual so as to restrict the individual's freedom of movement or to modify the individual's behavior.

(11) Riot--A situation in which three or more persons in the facility intentionally participate in conduct that constitutes a clear and present danger to persons or property and substantially obstructs the performance of facility operations or a program therein. Rebellion is a form of riot.

(12) Soft Restraints--Non-metallic wristlets and anklets used as stand-alone restraint devices or in conjunction with a restraint bed or restraint chair. These devices are designed to reduce the incidence of skin, nerve, and muscle, damage to the restrained subject's extremities.

§343.802. Requirements.

(a) Restraints shall only be used by juvenile supervision and probation officers.

(b) Prior to participating in any restraint, juvenile probation officers and juvenile supervision officers shall be trained in the use of the facility's specific verbal de-escalation policies, procedures, and practices.

(c) Prior to participating in a restraint, juvenile probation officers and juvenile supervision officers shall have received training and demonstrated competency in the Commission-approved restraint used by the facility.

(d) Restraints shall only be used in instances of an imminent threat of self injury, injury to others or serious property damage, or to prevent escapes.

(e) Restraints shall only be used as a last resort.

(f) Only the amount of force and type of restraint necessary to control the situation shall be used.

(g) Restraints shall be implemented in such a way as to protect the health and safety of the resident and others.

(h) Restraints shall be terminated as soon as the resident's behavior indicates that the imminent threat of self injury, injury to others, serious property damage, or the threat of escape has subsided.

§343.804. Prohibitions.

Restraints that employ a technique listed below are prohibited:

(1) restraints used for punishment, discipline, retaliation, harassment, compliance, intimidation, or as a substitute for an appropriate disciplinary seclusion;

(2) restraints that deprive the resident of basic human necessities, including restroom privileges, water, food, and clothing;

(3) restraints that are intended to inflict pain;

(4) restraints that place a resident in a prone or supine position with sustained or excessive pressure on the back, chest, or torso;

(5) restraints that place a resident in a prone or supine position with pressure on the neck or head;

(6) restraints that obstruct the resident's airway, including a procedure that places anything in, on, or over the resident's mouth or nose;

(7) restraints that interfere with the resident's ability to communicate;

(8) restraints that obstruct the view of the resident's face;

(9) any technique that does not require the monitoring of the resident's respiration and other signs of physical distress during the restraint; and

(10) percussive or electrical shocking devices.

§343.806. Documentation.

Except for §343.818 of this chapter, all restraints shall be fully documented and maintained. Written documentation regarding the use of restraints shall, at a minimum, require:

(1) the name of the resident;

(2) the staff member(s) name and title(s) who administered the restraint;

(3) the date of the restraint;

(4) the duration of each type of restraint, including notation of the time each type of restraint began and ended;

(5) the location of the restraint;

(6) the description of the preceding activities;

(7) the behavior which prompted the initial and the continued restraint of the resident;

(8) the type of restraint(s) applied;

(A) the specific type of personal restraint hold applied;

(B) the type of mechanical restraint device(s) applied;
and

(C) the type of chemical restraint(s) utilized;

(9) de-escalation efforts as well as all restraint alternatives attempted; and

(10) whether or not any injury occurred during the restraint and the description of the injury.

§343.808. Personal Restraint.

In addition to the requirements found in §§343.802, 343.804, and 343.806 of this chapter, the use of personal restraints shall be governed by the following criteria:

(1) Personal restraints shall be administered in a manner specific, or consistent, to the approved personal restraint technique adopted by the facility.

(2) Juvenile supervision and probation officers shall be retrained in the approved personal restraint technique at least every 365 calendar days.

§343.810. Mechanical Restraint.

(a) Requirements.

(1) Only the approved mechanical restraint devices shall be used by a facility.

(2) Mechanical restraint devices shall only be used in a manner consistent with their intended use.

(3) All mechanical restraint devices shall be inspected at least every 365 calendar days, with all faulty or malfunctioning devices restricted from use until they are repaired or replaced.

(b) Prohibitions.

(1) Approved mechanical restraint devices shall not be altered from the manufacturer's design.

(2) A resident shall not be placed in a prone position while restrained in any mechanical restraint for a period of time longer than necessary to apply the restraint device.

(3) A mechanical restraint shall not secure a resident in a prone, supine, or lateral position with his or her arms and hands behind the resident's back and secured to the resident's legs.

(4) Approved mechanical restraint devices shall not be secured so tightly as to interfere with circulation or so loosely as to cause chafing of the skin.

(5) Approved mechanical restraint devices shall not be secured to a stationary object, except when complete immobilization is required by use of a four-point restraint or a restraint chair.

(6) A resident in an approved mechanical restraint device shall not participate in any physical activity.

(7) Plastic cuffs shall only be used in emergency situations.

§343.812. Non-Ambulatory Mechanical Restraints.

(a) Non-ambulatory mechanical restraints shall only be used in response to a resident's overt behavior specific to self injury and only when other less restrictive interventions, or other forms of physical restraint, have been deemed to be inappropriate or ineffective.

(b) The initial use of non-ambulatory mechanical restraints shall receive incident-specific authorization from the facility administrator or the acting facility administrator. Standing orders authorizing non-ambulatory mechanical restraints are prohibited.

(c) Non-ambulatory mechanical restraints shall be conducted in an area or room which is not visible to other residents but in a location that is readily accessible to health care professionals or specially-trained staff with supervisory responsibilities specific to the oversight of the non-ambulatory mechanical restraints.

(d) Rooms or cells with fixed or static non-ambulatory mechanical restraint fixtures, mechanisms, etc. (e.g. anchoring points or devices), shall not be used to house residents not being restrained in a non-ambulatory mechanical restraint unless they are being provided constant supervision.

(e) Non-ambulatory mechanical restraints shall be restricted to only standards-compliant restraint beds, restraint chairs and soft restraint devices.

(f) A written recommendation from a health care professional or a mental health professional is required in order for a non-ambulatory mechanical restraint to continue longer than one hour.

(g) Non-ambulatory mechanical restraints lasting two hours in duration shall be considered a behavioral health crisis and shall result in an immediate referral to a mental health professional or a mental health facility for assessment and possible treatment.

(h) Under no circumstances shall a non-ambulatory mechanical restraint exceed three hours in duration within a 24 hour period.

(i) Residents in a non-ambulatory mechanical restraint shall be provided:

(1) constant visual supervision by a juvenile supervision officer;

(2) an opportunity for expanded physical motion or movement of not less than five minutes at every 30 minute interval;

(3) an opportunity to drink water every hour;

(4) regularly prescribed medications, unless otherwise ordered by a physician; and

(5) bathroom privileges offered at least every hour.

(i) Requirements enumerated in subsection (i)(1) - (5) of this section shall be fully documented and retained in the facility record or resident file.

(k) The following documentation shall be retained in the facility record or resident file:

(1) an assessment of the resident's circulation, positioning, and breathing conducted at least every ten minutes by a specially-trained juvenile supervision officer or a health care professional; and

(2) documented checks, performed by a health care professional, or specially-trained staff, of the physical condition of the resident and the placement of the mechanical restraint devices within the first 30 minutes of the restraint and every hour thereafter.

(l) The officer responsible for providing the constant visual supervision of a resident in a non-ambulatory mechanical restraint shall have physical possession of the key or other mechanism for releasing the resident from the restraint.

(m) Any juvenile probation officer or juvenile supervision officer authorized to place a resident in a non-ambulatory mechanical restraint, shall be trained in topics that include, but are not limited to:

(1) monitoring the vital signs and critical circulation points of a resident placed in the non-ambulatory mechanical restraint; and

(2) emergency procedures for the removal of a resident from the non-ambulatory mechanical restraint.

§343.816. Chemical Restraints.

In addition to the requirements found in §§343.802, 343.804, and 343.806 of this chapter, the use of chemical restraints shall be governed by the following criteria:

(1) chemical restraints shall only be used in response to episodes of resident riot and only then when other forms of approved restraints are deemed to be inappropriate or ineffective;

(2) the use of chemical restraints shall receive incident-specific authorization from the facility administrator or the acting facility administrator. Standing orders authorizing chemical restraints are prohibited;

(3) chemical restraints are restricted to professionally manufactured and commercially available defense sprays and vaporizing agents containing either Oleoresin Capsicum (i.e., OC pepper sprays) or Orthochlorobenzalmalononitrile (i.e., tear gas);

(4) chemical restraint deployment devices shall be stored in a locked area, and the issuance of these devices to juvenile supervision officers shall not commence until the facility administrator's authorization has been provided;

(5) chemical restraints shall not be used on a resident when he or she is in a personal or mechanical restraint, or otherwise under control;

(6) immediately following the use of a chemical restraint, the exposed resident shall be visually or physically examined by a medical professional and provided treatment if necessary; and

(7) chemical agent compatible neutralizers or decontaminants shall be readily available for use on residents who have been exposed to chemical restraints.

§343.818. Preventative Mechanical Restraints.

For resident, staff, and public safety purposes, a resident may be placed in ankle cuffs, handcuffs, wristlets or a waist belt absent the imminent threat requirements enumerated in §343.802(d) of this chapter. These types of preventative mechanical restraints are authorized under the following circumstances:

(1) Intra-facility relocation. Mechanical restraints may be used when moving a resident from point to point within a secure facility. The mechanical restraint devices shall be removed upon completion of the resident's relocation.

(2) Vehicular transport. A resident shall not be secured to:

(A) any part of the vehicle; or

(B) another resident.

(3) Off-site activities. Mechanical restraints may be used when a resident is required to leave the secure confines of the facility.

(4) The routine, preventative mechanical restraint applications used in this section are exempt from the documentation requirements contained in §343.806 of this chapter, except when the resident's cooperation is compelled through the use of a personal or chemical restraint; when the resident receives an injury in relation to the restraint event or restraint devices; or when the resident's behavior escalates to the imminent threat criteria listed in §343.802(d) of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa A. Capers

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Texas Juvenile Probation Commission

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CHAPTER 344. EMPLOYMENT, CERTIFICATION AND TRAINING

The Texas Juvenile Probation Commission proposes new Chapter 344, §§344.100, 344.110, 344.120, 344.200, 344.210, 344.220, 344.230, 344.300, 344.310, 344.320, 344.330, 344.340, 344.400, 344.410, 344.500, 344.510, 344.520, 344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, 344.680, 344.700, 344.800, 344.810,

344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880, and 344.890, relating to employment, certification and training for juvenile officers. These new standards are being proposed in an effort to consolidate and streamline requirements related to employment, certification and training from several other chapters of the Commission's standards. This chapter also introduces several new requirements designed to enhance training and certification requirements for juvenile officers and to simplify the certification process. These standards were originally published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 557) and are being withdrawn and republished with substantive changes for another thirty day public comment period.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the new rules are in effect, there will be no fiscal implications for state government or small businesses as a result of enforcement or implementation.

As for local government, the implementation of a requirement for participating in the electronic fingerprinting system through the Texas Department of Public Safety requires a fee of \$9.95 per person fingerprinted. Local juvenile departments may choose to pay this fee on behalf of their applicants and employees or may choose to require individuals to pay the fee themselves. The amount of fiscal impact for a specific department will be dependent upon the number of staff who must be fingerprinted and upon how the department decides to arrange for payment of the fee. Additionally, it is expected that the reduction in staff time required to obtain and maintain fingerprint records will offset this new fee.

Changes in the number of required training hours and changes related to the classifications of staff who must receive required training may increase training costs. However, several initiatives are being implemented by the Commission to offset this increased cost. These initiatives include: availability of web-based training in live and videotaped formats; increased regional training opportunities; and enhanced website resources, including training curricula and materials for use at the local level.

The new standards also require successful completion of a competency exam for certification. The Texas Juvenile Probation Commission will attempt to implement this requirement at little or no cost to local departments, however it is possible that there will be travel or other costs associated with completion of the exam. Departments may choose to defray these expenses to the individual test taker.

Ms. Capers has also determined that for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcement or implementation will be to ensure that qualified staff are able to provide services in a safe and effective manner to youth under the supervision of the juvenile court. There will be no impact on small business or individuals as a result of the new rules.

Public comments on the proposed rules may be submitted in writing to Diane Laffoon at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to Diane.Laffoon@tjpc.state.tx.us or faxed to (512) 424-6718.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§344.100, 344.110, 344.120

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new chapter.

§344.100. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless context clearly indicates otherwise.

(1) Applicant--An individual applying for certification as a juvenile probation officer or juvenile supervision officer.

(2) Board--The governing board of the Texas Juvenile Probation Commission.

(3) Certified Officer--A juvenile probation officer or juvenile supervision officer who has met the minimum certification requirements and is currently certified by the Commission.

(4) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for the oversight of the day-to-day operations of a single juvenile probation department for a county or a multi-county judicial district.

(5) Commission--The Texas Juvenile Probation Commission.

(6) Competency Examination--An examination or other assessment instrument required by any statute or Commission rule that governs an individual's certification as a juvenile probation officer or juvenile supervision officer.

(7) Continuing Education--Courses, programs, or organized learning experiences required to maintain certification and to enhance personal or professional goals.

(8) Direct Unsupervised Access--The ability to physically interact with juveniles in a juvenile justice program or facility without the accompanying physical presence of or constant visual monitoring by a certified officer or other authorized employee of the program or facility.

(9) Facility Administrator--An individual designated by the chief administrative officer or governing board of a juvenile justice facility as the on-site program director or superintendent of a secure facility.

(10) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(11) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(12) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of the Texas Family Code and Chapter 141 of the Texas Human Resources Code.

(13) Juvenile Probation Officer--An individual whose primary responsibility and essential job function is to provide juvenile probation services and supervision duties authorized under statutory and agency administrative law that can only be performed by an active certified juvenile probation officer in good standing with the Commission.

(14) Juvenile Supervision Officer--An individual whose primary responsibility and essential job function is the supervision of juveniles in a juvenile justice program or juvenile justice facility.

(15) Mandatory Topics--Specified training topics mandated in the Commission's administrative standards designed to provide officers the essential skills and knowledge necessary for certification and to fulfill the duties and responsibilities of a certified officer.

(16) One Year of Graduate Study--As described in Texas Human Resources Code §141.061(a)(3)(A), successful completion of at least 18 post-graduate credit hours in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission at a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(17) Training--An organized, planned and evaluated activity designed to achieve specific learning objectives.

§344.110. Interpretation and Applicability.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards herein.

(b) Conflicting Standards. If a general provision contained in this chapter conflicts with a specific provision contained in another chapter of an administrative standard promulgated by the Commission, the specific language controls.

(c) Applicability. The language contained herein applies to all certifications granted on or after the effective date of this chapter.

(d) Criminal History. Any felony conviction, felony deferred prosecution, felony deferred adjudication, misdemeanor conviction, misdemeanor deferred prosecution, or misdemeanor deferred adjudication occurring before September 1, 2003 will not disqualify a certified officer who held an active certification on September 1, 2003.

§344.120. The Compliance Resource Manual and Implementation of Agency Policy.

The Commission may establish by administrative rule or other reasonable agency policy, the required guidelines, procedures and documentation necessary to ensure compliance and verification of the standards set forth in this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER B. QUALIFICATIONS FOR EMPLOYMENT

37 TAC §§344.200, 344.210, 344.220, 344.230

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §349.7 and §341.20 of this title; and Human Resources Code §141.065.

§344.200. General Qualifications for Employment.

(a) Juvenile Probation Officer. To be eligible for employment as a juvenile probation officer, supervisor or chief administrative officer, an applicant shall:

(1) be at least 21 years of age;

(2) be of good moral character and have no disqualifying criminal history as described in this chapter;

(3) have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board;

(4) possess the work experience or graduate study required in §344.210 of this chapter; and

(5) never have had any type of certification revoked by lawful authority of the Commission and not be currently under an order of suspension as described in §344.840(d) of this chapter.

(b) Juvenile Supervision Officer. To be eligible for employment as a juvenile supervision officer, an applicant shall:

(1) be at least 21 years of age;

(2) be of good moral character and have no disqualifying criminal history as described in this chapter;

(3) have acquired a high school diploma or equivalent; and

(4) never have had any type of certification revoked by lawful authority of the Commission and not currently be under an order of suspension as described in §344.840(d) of this chapter.

(c) Facility Administrator. To be eligible for employment as a facility administrator, an applicant shall:

(1) meet the minimum requirements to become a juvenile probation officer as described in subsection (a) of this section; and

(2) maintain an active certification as a juvenile supervision officer.

§344.210. Work Experience.

(a) In lieu of the graduate study requirement in §344.500(a)(2) of this chapter, an applicant for the position of juvenile probation officer shall have one year of experience in full-time case work, counseling, community or group work:

(1) in a social service, community, corrections, or juvenile agency that deals with offenders or disadvantaged persons; and

(2) that the Commission has determined provides the kind of experience necessary to meet this requirement.

(b) Internships may be counted toward meeting one year's experience based on actual hours completed when the duties performed were related to the field of juvenile justice.

§344.220. Exemptions from Qualifying Work Experience.

(a) The juvenile board, chief administrative officer or designee shall submit to the Commission a request for exemption of the requirement of one year work experience or one year graduate study prior to the employment of an applicant who does not meet the requirements of this subsection.

(b) The exemption request shall be made using the form provided by the Commission and shall document that diligent efforts were made to employ an applicant who meets the work experience requirement.

(c) The chief administrative officer shall provide written notification to the chair of the juvenile board of a request for exemption under this section prior to employment of the applicant.

(d) The Commission shall review and may approve or deny the request.

§344.230. Persons Who May Not Act as Chief Administrative Officers, Juvenile Probation Officers, or Juvenile Supervision Officers.

A peace officer, prosecuting attorney, or other person who is employed by or who reports directly to a law enforcement or prosecution official may not act as a chief administrative officer, juvenile probation officer, or juvenile supervision officer or be made responsible for supervising a juvenile in a juvenile justice facility or program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa A. Capers

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SUBCHAPTER C. CRIMINAL HISTORY SEARCHES

37 TAC §§344.300, 344.310, 344.320, 344.330, 344.340

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§343.302, 343.304, 343.306, and 349.7 of this title.

§344.300. Criminal History Searches for Positions Requiring Certification.

(a) Fingerprint Search.

(1) Fingerprints shall be submitted through the Texas Department of Public Safety (DPS) Fingerprint Applicant Services of Texas (FAST) system.

(2) The juvenile board, chief administrative officer, facility administrator or designee shall initiate a fingerprint-based criminal history search through the FAST system prior to the first day of employment to confirm that the applicant has no disqualifying criminal history.

(b) Criminal History Clearinghouse. The Commission and the juvenile board or designee shall participate in the electronic clearinghouse and subscription service operated by the DPS. This service, known as the Fingerprint-based Applicant Clearinghouse of Texas (FACT), provides criminal history record information required for employment and certification and notifies the Commission and the chief administrative officer or designee of any disqualifying criminal conduct that may occur subsequent to the date of employment or certification.

(c) Military History. Applicants with prior military experience shall provide a copy of the DD-214 Discharge Form for each tour of duty. In the event a DD-214 reflects character of service as anything other than honorable discharge, the juvenile probation department shall obtain release of information authorization from the applicant and shall request additional information from the appropriate governmental entity to determine whether the reason for discharge was the result of disqualifying criminal conduct.

§344.310. Criminal History Searches for Positions Not Requiring Certification.

(a) Criminal history searches shall be conducted for all personnel providing services in juvenile justice facilities or programs who may have direct unsupervised access to juveniles in the facility or program. Prior to being granted access to juveniles in facilities or programs, criminal history searches shall be completed for the following:

(1) Non-Certified Staff. The chief administrative officer or designee shall conduct criminal history searches in accordance with the requirements set forth in §344.300 of this chapter for staff employed full or part-time by a juvenile justice program or juvenile justice facility in positions that do not require certification.

(2) Volunteers and Interns. The chief administrative officer or designee shall conduct criminal history searches in accordance with the requirements set forth in §344.300 of this chapter for volunteers and interns who provide services in juvenile justice programs and facilities.

(3) Service Providers. Service providers include public or private vendors who provide goods and/or services for the operation, management or administration of juvenile probation services and juvenile justice programs and facilities.

(A) Licensed Service Providers. Programs or facilities licensed by the Texas Department of Family and Protective Services, Texas Department of State Health Services or other state agency are exempt from the requirement to provide documentation of criminal history searches for staff employed in the program or facility. The chief administrative officer or designee shall obtain documentation confirming that the provider's license is in good standing with the licensing entity. The facility or program shall not contract for services with a provider whose license is not in good standing.

(B) Non-Licensed Service Providers. The chief administrative officer or designee shall obtain documentation from the provider's employing entity confirming that fingerprint-based criminal history searches of criminal information databases maintained by the Federal Bureau of Investigation and by the state of Texas have been completed within two years prior to the date of the most recent contract for services.

(b) Department policy shall prohibit direct unsupervised access to juveniles in a juvenile justice program or facility by any person with a disqualifying criminal history as described in §344.400 of this chapter.

(c) The juvenile board may grant an exemption to subsection (b) of this section for personnel described in this subsection whose criminal history report reflects class B misdemeanor activity. Exemptions shall be reviewed and granted on a case-by-case basis.

(d) The requirements of this section do not apply to the juvenile's attorney, family members or other individuals listed as a juvenile's approved visitors.

(e) The criminal history searches described in this section shall apply to individuals who begin employment or service provision on or after September 1, 2009.

§344.320. Criminal History Searches for Position and Departmental Transfers.

(a) Criminal history searches shall be completed by the employing juvenile justice program or facility in accordance with §344.300 of this chapter when:

(1) an individual who was not previously certified accepts a position requiring certification; or

(2) a certified officer employed in a juvenile probation program or facility accepts simultaneous or subsequent employment in a program or facility operated by or under contract with a different department.

(b) For individuals whose fingerprints are already in the Fingerprint Applicant Services of Texas (FAST) system, the searches may be conducted using the existing prints.

§344.330. Criminal History Searches for Secure Contract Facility Employees.

(a) The juvenile probation department in the county in which a secure pre or post-adjudication facility registered by the Commission and operated by a private vendor under contract with a juvenile board is located shall conduct criminal history searches for facility applicants for certified and uncertified positions as required under §344.300 of this chapter.

(b) The contract facility shall provide the juvenile board or designee with identifying information necessary to conduct the required criminal history searches.

(c) The chief administrative officer or designee shall review the criminal history report and provide a copy of the report to a facility with whom they have a written agreement that:

- (1) specifically authorizes access to the information;
- (2) limits the use of information to the purposes for which it is given;
- (3) ensures the security and confidentiality of the information; and
- (4) provides for sanctions if a requirement in paragraph (1), (2) or (3) of this subsection is violated.

(d) The facility administrator or designee shall contact the referring criminal justice agency to obtain information regarding any arrest for which a disposition has not been reported.

(e) The chief administrative officer or designee shall review the criminal history report to confirm that the applicant has no disqualifying criminal history.

§344.340. Criminal History Records Retention.

A copy of the initial criminal history report required in this section and any reports reflecting subsequent criminal activity shall be maintained for monitoring purposes for the duration of an individual's employment. These records shall be maintained as long as they are administratively valuable or in accordance with the county's established records retention schedule after the monitoring purpose has been fulfilled.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. DISQUALIFYING CRIMINAL HISTORY

37 TAC §344.400, §344.410

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§341.23, 343.320, 349.7, and 349.10 of this title.

§344.400. Disqualifying Criminal History.

(a) An individual with the following criminal history shall not be eligible for continued employment or certification:

- (1) a felony conviction against the laws of this state, another state, or the United States within the past ten (10) years;
- (2) a deferred adjudication for a felony against the laws of this state, another state, or the United States within the past ten (10) years;
- (3) a current felony deferred adjudication, probation or parole;
- (4) a jailable misdemeanor conviction against the laws of this state, another state, or the United States within the past five (5) years;
- (5) a deferred adjudication for a jailable misdemeanor against the laws of this state, another state, or the United States within the past five (5) years;
- (6) a current jailable misdemeanor deferred adjudication, probation or parole; or

(7) the requirement to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure.

(b) The offense disposition date shall be used to determine applicable time frames.

(c) In addition to the criteria and time frames set forth in subsection (a) of this section, the applicant shall not be eligible for employment or certification until at least one year has elapsed since the completion of any period of incarceration, community supervision, or parole.

(d) For eligible applicants with a prior criminal history, the department may consider a range of factors to determine the applicant's fitness to perform the duties and discharge the responsibilities of the position.

§344.410. Variance of Disqualifying Criminal History.

A variance under §349.2 of this title may not be requested for any Class A misdemeanor or felony unless the person received a pardon based upon proof of innocence or the reversal of a finding of guilt by a trial or appellate court.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. EDUCATION REQUIREMENTS FOR EMPLOYMENT AND CERTIFICATION

37 TAC §§344.500, 344.510, 344.520

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these new rules.

§344.500. Education Requirements.

(a) Juvenile Probation Officer. An applicant for employment as a juvenile probation officer must meet the following educational requirements:

(1) have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board; and

(2) have one year of graduate study in criminology, corrections, counseling, law, social work, psychology, sociology, or other field of instruction approved by the Commission or qualifying work experience as specified in §344.210 of this chapter.

(b) Juvenile Supervision Officer. An applicant for employment as a juvenile supervision officer must meet one of the following educational requirements:

(1) possess a high school diploma;

(2) a general equivalency diploma from a high school or issuing authority within the United States of America;

(3) a United States military record that indicates the education level received is equivalent to a United States high school diploma or general equivalency diploma;

(4) a foreign high school or home schooling diploma that meets the validation requirements established by the Commission; or

(5) be granted unconditional acceptance into an accredited college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

§344.510. Persons Not Subject to Minimum Qualifying Educational Requirements.

(a) Individuals employed as juvenile probation officers prior to September 1, 1981 and who have maintained continuous certification since that date shall not be subject to the minimum educational requirements set forth in Texas Human Resources Code §141.061(a) and in this chapter.

(b) An interruption or lapse of certification under this section shall result in a requirement for the officer to meet all current applicable employment, certification and training requirements.

§344.520. Verification of Education Requirements.

The applicant for employment as a juvenile probation officer or juvenile supervision officer shall provide the department or facility with official documentation that verifies that the applicant meets the educational requirements for certification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. TRAINING AND CONTINUING EDUCATION

37 TAC §§344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, 344.680

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rules and standards are affected by this subchapter: §§343.16, 349.7, and 349.15 of this title.

§344.600. Minimum Requirements for Certification.

An applicant for certification as a juvenile probation officer or juvenile supervision officer shall receive a minimum of 80 hours of training including training in mandatory topics described in §344.620 of this chapter prior to certification. Duties that may be performed by individuals hired as juvenile supervision officers or juvenile probation officers

prior to their certification are described in applicable chapters under Title 37 of the Texas Administrative Code.

§344.610. Relevance of Training and Standardized Curriculum.

(a) Training must be relevant to the knowledge and skills required in the performance of the officer's job duties to be considered for certification or continuing education credit.

(b) Training in the mandatory topics shall be conducted by training providers who have received specialized training in the curriculum from the Commission or from the employing department.

(c) The standardized curriculum provided by the Commission shall be used in the provision of training on the mandatory topics.

(d) The Commission reserves the right to refuse to approve or grant credit for training hours that do not comply with this standard.

§344.620. Required Training for Certification.

(a) Mandatory Topics. Successful completion of a competency exam based on the following topics is required prior to performing the duties of a certified officer and for certification.

(1) Juvenile Probation Officer.

- (A) Role of the probation officer;
- (B) Case planning and management;
- (C) Recognizing and supervising youth with mental health issues;
- (D) Officer safety and mechanical restraints;
- (E) Texas Family Code and related laws;
- (F) Legal liabilities;
- (G) Courtroom proceedings and presentation;
- (H) Code of ethics, disciplinary and revocation hearing procedures;
- (I) Identifying and reporting abuse, neglect, and exploitation;
- (J) Prison Rape Elimination Act; and
- (K) Suicide prevention and intervention.

(2) Juvenile Supervision Officer.

- (A) Juvenile rights;
- (B) Texas Family Code and related laws;
- (C) Identifying and reporting abuse, neglect, and exploitation;
- (D) Prison Rape Elimination Act;
- (E) Suicide prevention and intervention;
- (F) Legal liabilities;
- (G) Recognizing and supervising youth with mental health issues;
- (H) Adolescent physical development and exercise related health risks;
- (I) HIV/AIDS and other communicable diseases; and
- (J) Code of ethics, disciplinary and revocation procedures.

(b) Additional Requirements for Juvenile Supervision Officer Certification.

(1) Prior to providing resident supervision, all juvenile supervision officers shall receive training and maintain current certification in:

(A) Cardiopulmonary Resuscitation (CPR);

(B) First Aid; and

(C) A Personal Restraint Technique approved by the Commission.

(2) Juvenile supervision officers working in juvenile justice facilities shall receive training in the following additional topics for certification:

(A) Behavior observation and recording;

(B) Behavior management;

(C) Risk management, safety and security;

(D) Medical and health services;

(E) Departmental security, emergency and evacuation procedures;

(F) Facility's suicide prevention plan;

(G) Department procedures for reporting abuse, neglect and exploitation;

(H) Recognizing and responding to medical and mental health needs of residents;

(I) Supervising residents in seclusion;

(J) Facility's fire drill procedures;

(K) Grievance procedures;

(L) Confidentiality of information;

(M) Cultural diversity;

(N) Use of restraints; and

(O) Transportation.

§344.630. On-the-Job Training.

(a) A juvenile justice program or juvenile justice facility may implement a structured on-the-job training program for use in meeting certification and continuing education requirements as described in §344.620 of this chapter.

(b) The training program shall utilize the format developed by the Commission or an equivalent format developed by the department to document the provision of on-the-job training.

(c) The chief administrative officer, facility administrator or designee shall select staff, based on experience, qualifications and/or education, to provide on-the-job training.

(d) A maximum of 40 hours of on-the-job training provided in accordance with this section may be used to meet the certification or continuing education requirement in a given reporting period.

§344.640. Continuing Education Requirements for Maintaining Certification.

(a) A juvenile probation officer or juvenile supervision officer shall complete a minimum of 80 hours training every 24 months in topics related to the officer's job duties and responsibilities in order to maintain an active certification:

(1) For juvenile supervision officers, this training shall include the facility's suicide prevention plan and requirements necessary to maintain certification in CPR, First Aid and personal restraint technique approved by the Commission.

(2) For chief administrative officers and facility administrators, this training shall include a minimum of 20 hours of management topics.

(b) A maximum of 20 hours of training credit that exceeds the minimum requirement in a specific reporting period may be applied to the next reporting period.

(c) Documentation of the required continuing education shall be submitted to the Commission through the Commission's automated certification information system within 24 months of the initial certification date and every 24 months thereafter based on the officer's birth month.

§344.650. Non-Compliance with Training and Continuing Education Requirements.

(a) Failure to comply with §344.640 of this chapter shall result in the following:

(1) the officer's certification shall be placed on inactive status;

(2) the officer shall be restricted from performing the duties of a certified officer; and

(3) the officer shall be ineligible for salary adjustment funding from the Commission.

(b) The officer's certification will be returned to active status upon receipt of documentation that the required continuing education has been completed.

§344.660. Approval and Review of Training Topics.

(a) Approval of Training Topics. All certification and continuing education training shall be approved by the Commission. Training that is not applicable to the duties of a certified officer shall not be applied to the individual's certification or continuing education requirements.

(b) Review of Topics. A juvenile probation department may request a review of the Commission's decision to not approve a topic for certification credit. In support of the request, the juvenile probation department shall describe how the topic relates to the job duties and responsibilities of the officer. The Commission may request additional documentation to evaluate the appropriateness of the topic.

§344.670. Training Methods and Limitations.

(a) Limits on Topics.

(1) Repetitive Training. Credit shall not be allowed for training that is duplicative in nature unless the training is required to maintain certification, such as for CPR or First Aid, or is required to maintain an understanding of the officer's job duties and responsibilities. Topics listed in §344.620 of this chapter are exempt from this limitation.

(2) Review of Policy and Procedure. Credit for policy and procedure review shall be allowed when documentation reflects that the review was part of a structured training event.

(3) Human Resources Training. Training on employment related benefits and plans shall not be accepted for certification purposes unless the officer is a supervisor and the training relates to supervisory duties or the training is being provided as part of a formal leadership development program.

(b) Limitations on Training Methods. The limits in this subchapter apply to continuing education credits earned in a given 24 month period.

(1) Correspondence Courses. A maximum of 40 hours of continuing education credit may be earned for the successful comple-

tion of correspondence courses provided by recognized criminal justice organizations or accredited colleges or universities. Correspondence courses may not be used to meet the requirement for training in the mandatory training topics.

(2) Video-Conferencing and Web-Based Training. Credit for a combined total of 40 hours of video conferencing and web-based training methods may be applied toward certification and continuing education requirements.

(3) Video Training. A maximum of 20 hours of video training that is part of a structured training program may be applied to certification or continuing education requirements.

(4) Training Hours for Curriculum Development. A maximum of 10 hours of credit in a given continuing education period may be allowed for the development of training curriculum.

(5) Training Providers. Training providers may claim actual training time up to a maximum of 10 hours for the provision of training. The credit under this section is allowed only for the provision of training in topics listed in §344.620 of this chapter.

(6) Meetings/Staff Meetings. Meetings shall not be considered a training activity unless supporting documentation indicates that all or part of the meeting was designated solely for the purpose of training.

(7) College Courses. Up to 40 hours of continuing education credit may be applied for successful completion of a three-hour college course in a topic relevant to the officer's job duties and that is provided by a college or university accredited by an organization recognized by the Texas Higher Education Coordinating Board and approved by the Commission. Classes for which less than three hours of college credit is earned may be considered for continuing education credit. If approved, continuing education hours will be based on the number of classroom hours.

§344.680. Documentation.

Documentation of all training received shall be maintained in the department or facility's files for monitoring purposes. Documentation may include sign-in sheets, agendas, certificates of completion, correspondence from the instructor, registration receipts, and/or exam results. The chief administrative officer or designee shall, upon request, submit training records to a juvenile probation department in which an officer has obtained subsequent employment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901333

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 424-6682



SUBCHAPTER G. COMPETENCY EXAMINATION

37 TAC §344.700

This standard is proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Com-

mission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by this new rule.

§344.700. Competency Examination Requirement.

(a) A juvenile probation officer or juvenile supervision officer shall pass the competency exam prescribed by the Commission in order to be eligible for certification.

(b) A juvenile probation officer or juvenile supervision officer shall complete the mandatory training required in §344.620(a)(1) or (2) of this chapter prior to attempting the competency exam.

(c) The Commission shall establish a plan for the administration of the examination, including any required fees.

(d) The Commission shall determine the satisfactory level of performance.

(e) Scores shall be sent electronically or by other means established by the Commission to the examinee and the chief administrative officer or designee upon completion of the exam.

(f) The Commission shall maintain a record of competency examination results.

(g) The requirements of this subchapter apply to applicants for positions requiring certification who begin employment as juvenile probation officers on or after September 1, 2011 or who begin employment as juvenile supervision officers on or after September 1, 2012.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER H. CERTIFICATION

37 TAC §§344.800, 344.810, 344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880, 344.890

These standards are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

The following rule is affected by this subchapter: §349.8 of this title.

§344.800. Positions Requiring Certification.

Certain positions require certification by the Commission in order to perform the job functions of the position. Positions requiring certification are specified in applicable chapters under Title 37 of the Texas Administrative Code.

§344.810. Eligibility for Certification.

To be eligible for certification, an individual must:

(1) be twenty-one years of age or older;

(2) have achieved the level of education required for the certification, or been granted an exemption from this requirement;

(3) be of good moral character and have no disqualifying criminal history as described in this chapter;

(4) not be currently under an order of suspension issued under the lawful authority of the Commission;

(5) never have had any type of certification revoked by lawful authority of the Commission;

(6) have satisfactorily completed all pre-service training required by the Commission;

(7) have passed the competency examination as required by the Commission; and

(8) be employed by a governmental unit or a public or private vendor under contract with a governmental unit.

§344.820. Length of Certification.

The Commission may issue a non-expiring certification to individuals who meet the eligibility requirements under this chapter.

§344.830. Certification Renewal Period.

The employing juvenile justice program or facility shall submit, within 24 months of the initial certification date and every 24 months thereafter based on the officer's birth month, documentation that:

(1) the officer has completed the continuing education requirements in §344.640 of this chapter, and

(2) the criminal history search requirements in §344.300 of this chapter have been met.

§344.840. Certification Status.

(a) Active. An officer shall be required to maintain an active certification in order to perform the duties of a juvenile probation officer or juvenile supervision officer. The individual and the employing department shall ensure that all requirements under this chapter are met in order to maintain the certification in active status. An active certification status requires that the officer shall have:

(1) no disqualifying criminal history as described in §344.400 of this chapter;

(2) no current suspension or revocation of certification under the lawful authority of the Commission; and

(3) met the continuing education requirements set forth in §344.640 of this chapter.

(b) Inactive. An officer's certification shall be placed on inactive status in the event that the certification application is found to have a defect or flaw, the officer fails to meet reporting requirements or is no longer employed by a juvenile probation department. An individual whose certification is inactive is not eligible to perform the duties of a certified officer or to receive salary adjustment funds from the Commission. The juvenile probation department shall submit documentation through the Commission's automated certification system that an officer has completed all reporting requirements in accordance with §344.830 of this chapter in order to reactivate the officer's certification.

(c) Provisional. The Commission may issue a provisional certification for a period not to exceed 180 calendar days to an individual whose educational credentials require evaluation or verification. During the provisional certification period, the officer may perform the duties of a certified officer. In the event that the education validation is

denied or is not validated within the 180 calendar day period, the individual is no longer eligible to perform the duties of a juvenile probation or supervision officer.

(d) Suspended. An officer who is currently under an order of suspension is not eligible for certification by the Commission and shall not perform the duties of a certified officer. A suspension order shall be in effect until the date determined in the disciplinary hearing held by the Commission. In the event of suspension for failure to pay child support under §232.003 of the Texas Family Code, the suspension shall remain in effect until the Commission receives an order staying or vacating the suspension.

(e) Revoked. An officer who has had a certification revoked by lawful authority of the Commission is no longer eligible for employment or certification as a juvenile probation officer or juvenile supervision officer.

§344.850. Employment by a Governmental Unit.

A juvenile probation officer or juvenile supervision officer with a certification issued by the Commission under this chapter shall be employed by a governmental unit or a private provider under a contract with a governmental unit to maintain active status. The Commission shall place the officer's certification on inactive status upon receiving notification from the governmental unit of the individual's resignation or termination from employment.

§344.860. Certification Process.

(a) Submission of Applications. All certification applications shall be submitted through the Commission's automated certification information system.

(1) Chief Administrative Officers. The juvenile board or designee shall review the certification documentation and approve in writing the submission of the certification application for a chief administrative officer prior to submission of the application to the Commission.

(2) Facility Administrators. The juvenile board or the chief administrative officer shall review the certification documentation and approve in writing the submission of the certification application for a facility administrator prior to submission of the application to the Commission.

(3) Juvenile Probation Officer. The chief administrative officer or designee shall submit the certification application for a juvenile probation officer.

(4) Juvenile Supervision Officer. The chief administrative officer, facility administrator, or designee shall submit the certification application for a juvenile supervision officer.

(b) Timeline for Submission. The certification application shall be submitted to the Commission no more than 180 calendar days from the date of initial employment.

(1) An individual whose application for certification has not been submitted within this time frame:

(A) shall not perform the duties of a certified officer;
and

(B) shall not count toward the program's staff to child ratios.

(2) An extension of up to 90 days may be allowed for part time staff who have not completed the required training.

(c) Valid Criminal History Searches. Criminal history searches shall have been completed within 180 days prior to submis-

sion of the initial certification or certification renewal application. Dates of return shall be included in the application.

(d) Approval of Applications. The Commission shall review information contained in an application to determine certification eligibility. The Commission shall reserve the right to request additional information or documentation. The juvenile probation department will be notified of certification decisions through the Commission's automated certification information system. Any officer whose application is denied shall not perform the duties of a certified officer.

(e) Training Documentation. The juvenile probation department shall utilize the Commission's training and tracking system or an equivalent automated system to document training and continuing education received by certified officers. Training information shall be included in the certification application and submitted through the Commission's automated certification system.

§344.870. Requests for Extension.

(a) The Commission may grant an extension in the event of an unexpected extended absence from employment to allow a certified officer additional time to obtain training necessary to maintain active certification status.

(b) Approved extensions will be granted in increments up to 90 calendar days from the date the certification renewal information was due. Additional time may be requested in special circumstances such as leave under the Family Medical Leave Act (FMLA) or worker's compensation leave.

(c) An officer whose absence is due to leave for military duty will be granted an extension for an amount of time equal to the period of military leave up to a maximum of 24 months.

(d) An officer who does not satisfy all requirements necessary to maintain active status within the extension period shall not perform the duties of a certified officer or receive salary adjustment funds from the Commission.

§344.880. Transfer or Reactivation of Certification.

(a) The employing juvenile justice program or facility shall request through the Commission's automated certification system that an officer's certification be transferred or reactivated when an officer is hired who is:

(1) currently certified and employed in another juvenile justice program or facility, or

(2) returning from inactive status.

(b) The request for transfer shall include verification that all criminal history searches have been completed in accordance with §344.300 of this chapter.

(c) The department shall include documentation in the officer's personnel file to confirm that training required to maintain certification has been completed within the required time frames.

(1) The juvenile board, chief administrative officer, facility administrator, or designee shall forward a copy of the officer's training records to the employing program or facility upon request.

(2) The officer shall provide documentation of any additional training received during a period of inactive certification.

(3) Training required to reactive certification shall be completed within 180 days of employment.

§344.890. Termination of Employment.

The juvenile board, chief administrative officer, or designee shall notify the Commission of the resignation or termination of individuals

employed in positions requiring certification within 10 working days of the date of their separation from employment. Upon receipt of notice, the Commission shall place the certified officer's certification on inactive status.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



CHAPTER 350. INVESTIGATING ABUSE, NEGLECT, EXPLOITATION, DEATH AND SERIOUS INCIDENTS

37 TAC §§350.100, 350.110, 350.120, 350.200, 350.210, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, 350.900 - 350.904

The Texas Juvenile Probation Commission proposes new Chapter 350, §§350.100, 350.110, 350.120, 350.200, 350.210, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, and 350.900 - 350.904, relating to investigating abuse, neglect, exploitation, death and serious incidents by the Texas Juvenile Probation Commission. These new standards are being proposed in an effort to ensure that the agency's investigators have the ability to conduct comprehensive investigations in a more timely and efficient manner. These standards were originally published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 566) and are being withdrawn and republished with substantive changes for another thirty day public comment period.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the new rules are in effect, there will be no fiscal implications for state government, local government or small businesses as a result of enforcement or implementation.

Ms. Capers has also determined that for each year of the first five years the new rules are in effect, the public benefit expected as a result of enforcement or implementation will be the ability to conduct more efficient and comprehensive investigations which will provide a greater level of safety for the juveniles and communities we serve. There will be no impact on small business or individuals as a result of the sections.

Public comments on the proposed rules may be submitted in writing to Diane Laffoon at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Diane.Laffoon@tjpc.state.tx.us* or faxed to (512) 424-6718.

These new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these new rules.

§350.100. Definitions.

(a) The terms used in this chapter apply to the investigations of alleged abuse, neglect, exploitation, death conducted by the Commission and to the Commission's procedures relating to serious incidents.

(b) Terms used in this chapter shall have the following meanings unless otherwise expressly defined within the chapter.

(1) Abuse, Neglect and Exploitation--The definitions of "abuse," "neglect" and "exploitation" shall have the meanings ascribed under Texas Family Code §261.001 and §261.401. For the purposes of this chapter, "abuse" includes serious physical abuse and sexual as defined in this section.

(2) Administrator--The chief administrative officer of a juvenile probation department, a public or private juvenile justice program or a public or private juvenile justice facility.

(3) Administrative Designee--The role assigned to the administrator, when a preponderance of evidence determines that the proximate cause of the allegation was based on policies and procedures under the direct control of the administrator.

(4) Alleged Perpetrator--A person alleged as being responsible for the abuse, neglect or exploitation of a juvenile through the person's actions or failure to act.

(5) Alleged Victim--A juvenile under the jurisdiction of the juvenile court or participating in a program operated under the authority of the governing board or juvenile board who is alleged to be a victim of abuse, neglect or exploitation.

(6) Attempted Suicide--Any voluntary and intentional action that could reasonably result in taking one's own life.

(7) Call Line--The Commission's toll-free number available for the purpose of reporting allegations of abuse, neglect, exploitation, death and serious incidents within the juvenile justice system.

(8) Commission--The Texas Juvenile Probation Commission.

(9) Designated Perpetrator--The individual responsible for the abuse, neglect or exploitation of a juvenile who has not exhausted the right to administrative review or whose right to administrative review has not expired.

(10) Designated Victim--The juvenile who was abused, neglected or exploited.

(11) Escape--

(A) The voluntary, unauthorized departure, or attempt to depart, by an individual who is in custody; or

(B) Failure to return to custody following an authorized temporary leave for a specific purpose or limited period.

(12) Incident Report Form--The required form used to report to the Commission alleged abuse, neglect, exploitation, death and serious incidents.

(13) Internal Investigation Report--The written report submitted to the Commission that summarizes the steps taken and the evidence collected during an internal investigation of alleged abuse, neglect, exploitation or death.

(14) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program.

(15) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes, but is not limited to:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(16) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board, or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(17) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board(s) to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of Texas Family Code and Chapter 141 of Texas Human Resources Code.

(18) Peace Officer--A person elected, employed, or appointed as a peace officer under Code of Criminal Procedure, Article 2.12.

(19) Report--Formal notification to the Commission of alleged abuse, neglect, exploitation or death or of a serious incident.

(20) Reportable Injury--Any injury sustained accidentally, intentionally, recklessly or otherwise that:

(A) Requires medical treatment as defined in this section; or

(B) Results from a personal, mechanical or chemical restraint and is a substantial injury as defined in this section.

(21) Serious Incident--Attempted escape, attempted suicide, escape, reportable injury, youth-on-youth physical assault or youth sexual conduct as defined in this section.

(22) Serious Physical Abuse--Bodily harm or condition that resulted directly or indirectly from the conduct that formed the basis of an allegation of abuse, neglect or exploitation, if the bodily harm or condition requires medical treatment as defined in this section.

(23) Sexual Abuse--Conduct committed by any person against a juvenile that includes sexual abuse by contact or sexual abuse by non-contact. A juvenile, regardless of age, may not affirmatively or impliedly consent to the acts as defined in this section under any circumstances.

(24) Sexual Abuse by Contact--Any physical contact with a juvenile that includes: intentional touching of the genitalia, anus,

groin, breast, inner thigh or buttocks with the intent to abuse, intimidate, hurt, humiliate or harass, arouse or gratify sexual desire; deviate sexual intercourse; sexual contact; sexual intercourse; or sexual performance as those terms are defined in subparagraphs (A) and (D) of this paragraph.

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with a hand, finger or other object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons including simulated or actual sexual intercourse, deviate sexual intercourse, bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(25) Sexual Abuse by Non-Contact--Any sexual behavior, conduct, harassment or actions other than those defined by sexual abuse by contact, which are exhibited, performed or simulated:

(A) in the presence of a juvenile or with reckless disregard for the presence of a juvenile;

(B) with the intent to arouse or gratify the sexual desire of any person;

(C) with the intent to intimidate, hurt, humiliate or harass any person;

(D) including repeated verbal statement or comments of a sexual nature; and

(E) including demeaning references to gender, derogatory comments about body or clothing or profane or obscene language or gestures.

(F) These behaviors, conduct and actions include indecent exposure, voyeurism, distribution or exhibition of pornographic or sexually explicit material or sexual performance as defined in paragraph (24)(D) of this subsection.

(26) Substantial Injury--An injury that is significant in size, degree or severity.

(27) Sustained Perpetrator--A designated perpetrator as defined in this section who has already been offered the right to an administrative review and the designated perpetrator's rights to the administrative review have expired or the disposition was upheld.

(28) TCLEOSE--Texas Commission on Law Enforcement Officer Standards and Education.

(29) Youth-on-Youth Physical Assault--A physical altercation between two or more juveniles that results in any of the involved

parties sustaining an injury that requires medical treatment as defined in this section.

(30) Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, sexual performance as those terms are defined in paragraph (24) of this subsection or sexual behavior, conduct or actions which are exhibited, performed or simulated as those terms are defined in paragraph (25) of this subsection. A juvenile may not consent to the acts as defined in this section under any circumstances. Consent may not be implied regardless of the age of the juvenile.

§350.110. Interpretation.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards in this chapter.

(b) Including. The word, "including" when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but rather as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

§350.120. Applicability.

Unless otherwise noted, these standards apply to the investigations of all alleged abuse, neglect and exploitation, death conducted by the Commission and serious incidents involving a juvenile and an employee, intern, volunteer, contractor or service provider.

(1) Texas Family Code §261.405(b) gives the Commission the authority to conduct abuse, neglect and exploitation investigations in any juvenile justice department, program or facility. The investigations conducted by the Commission are governed by Texas Family Code Chapter 261.

(2) Investigations conducted by the Commission are governed by Texas Family Code Chapter 261.

§350.200. Assessment.

An assessment shall be completed on all reports of alleged abuse, neglect, exploitation or death received by the Commission.

(1) Reports of alleged abuse, neglect, exploitation or death within the Commission's investigative jurisdiction shall, regardless of the source, or severity or perceived lack thereof, be assigned for investigation.

(2) Reports of alleged abuse, neglect, exploitation or death not within the Commission's investigative jurisdiction shall be referred to the appropriate division within the Commission or other governmental unit having jurisdiction.

§350.210. Prioritization, Activation and Initiation.

(a) Prioritization. All reports of alleged abuse, neglect, exploitation or death shall be assigned a priority level.

(b) Activation. Investigations are activated when the Commission makes the initial notification to law enforcement.

(c) Initiation. Investigations are initiated when the assigned investigator contacts or attempts to contact, via phone, fax, e-mail or in person a representative of the department, program, facility, governing board, juvenile board; law enforcement agency; the reporter; or any person with knowledge of the alleged incident.

§350.300. Investigations.

(a) Primary Objective. The primary objective of each Commission investigation is to ensure the health, safety and well being of the alleged victim and other juveniles under the jurisdiction of the juvenile court.

(b) Occurrence. Commission investigations are conducted to determine if the alleged abuse, neglect or exploitation occurred.

(c) Statutory Definitions. Commission investigations determine if the elements of the alleged incident correspond to the statutory definitions in Texas Family Code Chapter 261.

(d) Risk and Compliance. Commission investigations serve to assess risk potential and compliance with applicable administrative standards.

§350.400. Notification and Referral.

(a) Notification of Disposition. At the conclusion of an investigation, notification of the disposition shall be forwarded to the appropriate parties in accordance with applicable Commission policies and procedures.

(b) Notice to Prosecutor. Notifications to the district or county attorney's office prosecuting criminal matters in the jurisdiction in which the Commission conducted the investigation, shall be forwarded in accordance with applicable Commission policies and procedures.

(c) Non-Compliance Citation Report. A Non-Compliance Citation Report (NCCR) shall be issued in accordance with applicable Commission policies and procedures.

(d) Notice of Technical Assistance. A "Notice of Technical Assistance" (NTA) shall be issued in accordance with applicable Commission policies and procedures.

§350.500. Requests for Disciplinary Action.

Requests for disciplinary action shall be submitted in accordance with applicable administrative standards and Commission policies and procedures.

§350.600. Retention, Release and Redaction of Commission Records.

(a) Record Development. In accordance with Texas Family Code §261.402, the Commission shall develop and maintain a record of each report of alleged abuse, neglect, exploitation or death.

(b) Database. The Commission shall maintain an electronic database containing information regarding all reports of alleged abuse, neglect, exploitation, death and serious incidents.

(c) Record Retention. The investigation records maintained by the Commission are confidential and shall be retained in accordance with the retention schedule adopted by the Commission or other applicable laws.

§350.610. Release of Confidential Information.

Confidential information shall be released in accordance with the Commission's policies and procedures and other applicable statutory provisions governing the disclosure of confidential information.

§350.620. Redaction of Records.

In certain cases, an alleged perpetrator's identifying information may be redacted from the Commission's records.

(1) Automatic Redaction. The Commission shall, in cases in which the disposition is baseless, automatically and permanently redact the alleged perpetrator's identifying information from the Commission's case record.

(2) Request for Redaction. The alleged perpetrator may request that his or her identifying information be redacted from the Commission's records if:

(A) The Commission's final disposition of the case in which the alleged perpetrator was involved is "Ruled Out;"

(B) The alleged perpetrator submits the request for redaction in writing to the Commission's Legal Division;

(C) The alleged perpetrator submits the request for redaction within 30 calendar days of the last day of the corresponding limitation period described in paragraph (3) of this section;

(D) The alleged perpetrator has been continuously employed within the Texas juvenile justice system for the time period as specified in this paragraph; and

(E) The alleged perpetrator has not been named as the subject of investigation in a subsequent case of abuse, neglect or exploitation.

(3) Limitation Periods. A request for redaction may only be made if all requirements of paragraph (2) of this section are met and if:

(A) Two years has expired from the date of the Commission's final disposition of "Ruled Out", and if, notwithstanding a violation of the Texas Administrative Code, the investigation of the alleged abuse, neglect or exploitation did not produce evidence of a violation of laws of this state or of the United States;

(B) Three years has expired from the date of the Commission's final disposition of "Ruled Out," if the allegation does not meet the elements of paragraph (1) or (3) of this section; or

(C) Five years has expired from the date of the Commission's final disposition of "Ruled Out," if the allegation involved serious physical abuse as defined in §350.100(b)(22) of this chapter or sexual conduct as defined in §350.100(b)(23), (24) or (25) of this chapter.

§350.700. Call Line.

In accordance with applicable policies and procedures, the Commission shall maintain a toll-free number to facilitate the reporting of alleged abuse, neglect, exploitation, death and serious incidents.

§350.800. Serious Incidents.

An assessment to determine jurisdiction, classification and if follow-up action is needed, shall be completed on all serious incidents received by the Commission.

§350.900. Training and Quality Assurance.

Commission investigators shall receive current and relevant training in the discipline of investigating alleged abuse, neglect, exploitation and death. Quality assurance measures shall be implemented to help ensure that Commission investigations are conducted in accordance with the rules contained in this chapter and in accordance with applicable Commission policies and procedures.

§350.901. Pre-Service Training.

Investigators shall receive pre-service training hours in the laws, statutes, administrative rules and agency policies and procedures governing and relevant to conducting administrative investigations of abuse, neglect, exploitation and death of juveniles within the juvenile justice system.

§350.902. Competency Testing.

Investigators shall demonstrate a minimum proficiency in select topics received during pre-service training.

§350.903. Continuing Education.

Continuing education shall include topics relevant to conducting investigations of abuse, neglect, exploitation and death of juveniles within the juvenile justice system and topics relevant to the practices of juvenile justice professionals.

(1) Investigators shall successfully complete a minimum number of hours of continuing education training in accordance with applicable Commission policies and procedures.

(2) In addition to the requirements of paragraph (1) of this section, investigators licensed as peace officer shall adhere to the training requirements in accordance with the administrative rules as established by TCLEOSE in Title 37, Part 7 of the Texas Administrative Code.

§350.904. Quality Assurance.

During each fiscal year internal quality assurance reviews of active and completed investigations shall be conducted.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901337

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 424-6682



CHAPTER 358. IDENTIFYING, REPORTING AND INVESTIGATING ABUSE, NEGLECT, EXPLOITATION, DEATH AND SERIOUS INCIDENTS

37 TAC §§358.100, 358.120, 358.140, 358.200, 358.220, 358.300, 358.320, 358.400, 358.420, 358.440, 358.460, 358.480, 358.500, 358.600, 358.620, 358.640, 358.660, 358.680, 358.700, 358.720, 358.740, 358.760, 358.780, 358.800, 358.820, 358.840, 358.900, 358.920

The Texas Juvenile Probation Commission proposes new Chapter 358, §§358.100, 358.120, 358.140, 358.200, 358.220, 358.300, 358.320, 358.400, 358.420, 358.440, 358.460, 358.480, 358.500, 358.600, 358.620, 358.640, 358.660, 358.680, 358.700, 358.720, 358.740, 358.760, 358.780, 358.800, 358.820, 358.840, 358.900, and 358.920, relating to identifying, reporting and investigating abuse, neglect, exploitation, death and serious incidents in departments, programs and facilities. These new rules are being proposed to provide the departments, programs and facilities more comprehensive and well-formulated guidelines for identifying and reporting allegations of abuse, neglect and exploitation. These standards were originally published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 569) and are being withdrawn and republished with substantive changes for another thirty day public comment period.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the new rules are in effect, there will be no fiscal implications small businesses as a result of enforcement or implementation. The fiscal implications for state government, in particular, the Texas Juvenile Probation Commission will be minimal. The Texas Juvenile Probation Commission will provide the signage the facilities will be required to post regarding a juvenile's right and ability to report

allegations of abuse, neglect and exploitation under §358.480. The fiscal impact to the local (county) government, if any, will be minimal. Local governments may opt to install a special phone line to accommodate the call-line as described under §358.440; however, taking such action is not a requirement of the standard and would be a voluntary expenditure.

Ms. Capers has also determined that for each year of the first five years these new rules are in effect, the public benefit expected as a result of enforcement or implementation will be to provide additional protections for the juveniles served throughout the juvenile justice system. There will be no impact on small business or individuals as a result of these rules.

Public comments on the proposed rules may be submitted in writing to Diane Laffoon at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547. Comments may also be submitted electronically to *Diane.Laffoon@tjpc.state.tx.us* or faxed to (512) 424-6718.

These new rules are proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other rule or standard is affected by these new rules.

§358.100. Definitions.

Terms used in this chapter shall have the following meanings unless otherwise expressly defined within the chapter.

(1) Abuse, Neglect, or Exploitation--The definitions of "abuse," "neglect" and "exploitation" shall have the meaning ascribed under Texas Family Code §261.001 and §261.401. For the purposes of this chapter, "abuse" includes serious physical abuse and sexual as defined in this section.

(2) Administrator--The chief administrative officer of a juvenile probation department, a public or private juvenile justice program or a public or private juvenile justice facility.

(3) Alleged Victim--A juvenile under the jurisdiction of the juvenile court or participating in a program operated under the authority of the governing board or juvenile board who is alleged to be a victim of abuse, neglect or exploitation.

(4) Attempted Suicide--Any voluntary and intentional action that could reasonably result in taking one's own life.

(5) Call Line--The toll-free number made available for reporting allegations of abuse, neglect, exploitation and serious incidents within the juvenile justice system.

(6) Commission--The Texas Juvenile Probation Commission.

(7) Escape--

(A) The voluntary, unauthorized departure, or attempt to depart, by an individual who is in custody; or

(B) Failure to return to custody following an authorized temporary leave for a specific purpose or limited period.

(8) Founded--The finding assigned to an internal investigation when the evidence indicates that the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, occurred.

(9) Incident Report Form--The required form used to report to the Commission allegations of abuse, neglect, exploitation, death and serious incidents.

(10) Inconclusive--The finding assigned to an internal investigation when the evidence does not clearly indicate whether or not the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, occurred.

(11) Internal Investigation--A formalized and systematic inquiry conducted by the administrator or designee of a juvenile probation department, juvenile justice program or juvenile justice facility in response to an allegation of abuse, neglect, exploitation or death.

(12) Internal Investigation Report--The written report submitted to the Commission that summarizes the steps taken and the evidence collected during an internal investigation of alleged abuse, neglect, exploitation or death.

(13) Juvenile--A person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program.

(14) Juvenile Justice Facility ("facility")--A facility, including its premises and all affiliated sites, whether contiguous or detached, operated wholly or partly by or under the authority of the governing board, juvenile board or by a private vendor under a contract with the governing board, juvenile board or governmental unit that serves juveniles under juvenile court jurisdiction. The term includes, but is not limited to:

(A) A public or private juvenile pre-adjudication secure detention facility, including a short-term detention facility (i.e., holdover) required to be certified in accordance with Texas Family Code §51.12;

(B) A public or private juvenile post-adjudication secure correctional facility required to be certified in accordance with Texas Family Code §51.125, except for a facility operated solely for children committed to the Texas Youth Commission; and

(C) A public or private non-secure juvenile post-adjudication residential treatment facility housing juveniles under juvenile court jurisdiction.

(15) Juvenile Justice Program ("program")--A program or department operated wholly or partly by the governing board, juvenile board or by a private vendor under a contract with the governing board, or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes a juvenile justice alternative education program and a non-residential program that serves juvenile offenders under the jurisdiction of the juvenile court or juvenile board jurisdiction and a juvenile probation department.

(16) Juvenile Probation Department ("department")--All physical offices and premises utilized by a county or district level governmental unit established under the authority of a juvenile board(s) to facilitate the execution of the responsibilities of a juvenile probation department enumerated in Title 3 of the Texas Family Code and Chapter 141 of the Texas Human Resources Code.

(17) Medical Treatment--Medical care, processes and procedures that are performed by a physician, physician assistant, licensed nurse practitioner, emergency medical technician (EMT), paramedic or dentist. Diagnostic procedures are excluded unless further intervention beyond basic first aid is required.

(18) Reasonable Belief--A belief that would be held by an ordinary and prudent person in the same circumstances as the reporter.

(19) Report--Formal notification to the Commission of alleged abuse, neglect, exploitation or death or of serious incident.

(20) Reportable Injury--Any injury sustained accidentally, intentionally, recklessly or otherwise that:

(A) Requires medical treatment as defined in this section; or

(B) Results from a personal, mechanical or chemical restraint and is a substantial injury as defined in this section.

(21) Serious Incident--Attempted escape, attempted suicide, escape, reportable injury, youth-on-youth physical assault or youth sexual conduct as defined in this section.

(22) Serious Physical Abuse--Bodily harm or condition that resulted directly or indirectly from the conduct that formed the basis of an allegation of abuse, neglect or exploitation, if the bodily harm or condition requires medical treatment as defined in this section.

(23) Sexual Abuse--Conduct committed by any person against a juvenile that includes sexual abuse by contact or sexual abuse by non-contact. A juvenile, regardless of age, may not affirmatively or impliedly consent to the acts as defined in paragraphs (24) and (25) of this section under any circumstances.

(24) Sexual Abuse by Contact--Any physical contact with a juvenile that includes: intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks with the intent to abuse, intimidate, hurt, humiliate or harass, arouse or gratify sexual desire; deviate sexual intercourse; sexual contact; sexual intercourse; or sexual performance as those terms are defined in subparagraphs (A) - (D) of this paragraph.

(A) "Deviate sexual intercourse" means:

(i) any contact between any part of the genitals of one person and the mouth or anus of another person; or

(ii) the penetration of the genitals or the anus of another person with a hand, finger or other object.

(B) "Sexual contact" means the following acts, if committed with the intent to arouse or gratify the sexual desire of any person:

(i) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a person; or

(ii) any touching of any part of the body of a person, including touching through clothing, with the anus, breast, or any part of the genitals of a person.

(C) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(D) "Sexual performance" means acts of a sexual or suggestive nature performed in front of one or more persons including simulated or actual sexual intercourse, deviate sexual intercourse, bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

(25) Sexual Abuse by Non-Contact--Any sexual behavior, conduct, harassment or actions other than those defined by sexual abuse by contact, which are exhibited, performed or simulated:

(A) in the presence of a juvenile or with reckless disregard for the presence of a juvenile;

(B) with the intent to arouse or gratify the sexual desire of any person;

(C) with the intent to intimidate, hurt, humiliate or harass any person;

(D) including repeated verbal statement or comments of a sexual nature; and

(E) including demeaning references to gender, derogatory comments about body or clothing or profane or obscene language or gestures.

(F) These behaviors, conduct and actions include indecent exposure, voyeurism, distribution or exhibition of pornographic or sexually explicit material or sexual performance as defined in paragraph (24)(D) of this section.

(26) Subject of Investigation--A person alleged as being responsible for the abuse, neglect or exploitation of a juvenile through the person's own actions or failure to act.

(27) Substantial Injury--An injury that is significant in size, degree or severity.

(28) Unfounded--The finding assigned to an internal investigation when the evidence indicates the conduct, which formed the basis of an allegation of abuse, neglect or exploitation, did not occur.

(29) Youth-on-Youth Physical Assault--A physical altercation between two or more juveniles that results in any of the involved parties sustaining an injury that requires medical treatment as defined in this section.

(30) Youth Sexual Conduct--Two or more juveniles, regardless of age, who engage in deviate sexual intercourse, sexual contact, sexual intercourse, sexual performance as those terms are defined in paragraph (24) of this section or sexual behavior, conduct or actions which are exhibited, performed or simulated as those terms are defined in paragraph (25) of this section. A juvenile may not consent to the acts as defined in paragraphs (24) and (25) of this section under any circumstances. Consent may not be implied regardless of the age of the juvenile.

§358.120. Interpretation.

(a) Headings. The headings in this chapter are for convenience only and are not intended as a guide to the interpretation of the standards in this chapter.

(b) Including. The word, "including" when following a general statement or term, is not to be construed as limiting the general statement or term to any specific item or manner set forth or to similar items or matters, but rather as permitting the general statement or term to refer also to all other items or matters that could reasonably fall within its broadest possible scope.

§358.140. Applicability.

Unless otherwise noted, these standards apply to all allegations abuse, neglect and exploitation, death and serious incidents involving a juvenile and an employee, intern, volunteer, contractor or service provider (hereafter referred to as "any person" or "all persons") in a juvenile probation department ("department"), juvenile justice program ("program") or juvenile justice facility ("facility"), regardless of the location of the alleged abuse, neglect, exploitation, death or serious incident.

§358.200. Policy and Procedure.

Departments, programs and facilities shall have written policies and procedures for reporting serious incidents to the Commission and for reporting deaths and alleged abuse, neglect and exploitation to local law enforcement, the Commission and other appropriate governmental units.

§358.220. Data Collection.

(a) Departments, programs and facilities shall fully and promptly provide requested data pertinent to alleged abuse, neglect, exploitation, death and serious incidents to the Commission.

(b) The data shall be submitted in the electronic format requested or supplied by the Commission.

(c) The data shall include:

- (1) Alleged victim(s) name;
- (2) Alleged victim(s) personal identification number (PID);
- (3) Name of subject(s) of investigation;
- (4) Date of birth and driver's license or state issued identification number of subject(s) of investigation;
- (5) Date of alleged incident;
- (6) Time of alleged incident;
- (7) Date the alleged incident was reported to the Commission;
- (8) Type of alleged incident (i.e., abuse, neglect or exploitation (ANE), death or serious incident (SI));
- (9) Type of injury, if applicable;
- (10) Restraint related, if so, what type (i.e., personal, mechanical or chemical);
- (11) Disposition of internal investigation (i.e., Founded, Unfounded, Inconclusive); and
- (12) County generated case identification number.

(d) The data shall be supplied at least annually or as required by Commission.

§358.300. Serious Incidents.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from a juvenile or other person with knowledge of or who has a reasonable belief as to the occurrence of a serious incident involving a juvenile shall report to the Commission.

(b) Time to Report. A report of a serious incident under subsection (a) of this section shall be made within 24 hours from the time a person gains knowledge of or suspects the serious incident occurred.

(c) Methods of Reporting Serious Incidents.

(1) The report shall be made by phone, or by faxing or e-mailing a completed Incident Report Form to the Commission.

(2) If the report is made by phone, a completed Incident Report Form shall be subsequently submitted to the Commission within 24 hours of the phone report.

§358.320. Medical Documentation for Serious Incidents.

A treatment discharge form or other medical documentation that contains evidence of medical treatment pertinent to the reported incident shall be submitted to the Commission within 24 hours of receipt.

§358.400. Abuse, Neglect and Exploitation.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge of or who has a reasonable belief as to the occurrence of alleged abuse, neglect or exploitation involving a juvenile shall report to the Commission and local law enforcement.

(b) Non-Delegation of Duty to Report. In accordance with Texas Family Code §261.101, the duty to report cannot be delegated to another person.

(c) Time to Report. A report of alleged abuse, neglect or exploitation under subsection (a) of this section, other than death and allegations involving serious physical abuse or sexual abuse, shall be made

within 24 hours from the time a person gains knowledge of or suspects the alleged abuse, neglect or exploitation.

(d) Methods for Reporting Abuse, Neglect and Exploitation.

(1) The report shall be made by phone, or by faxing or e-mailing a completed Incident Report Form to the Commission.

(2) If the report is made by phone, a completed Incident Report Form shall be subsequently submitted to the Commission within 24 hours of the phone report.

§358.420. Allegations Occurring Outside the Juvenile System.

Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge or who has a reasonable belief as to the occurrence of alleged abuse, neglect or exploitation involving a juvenile, but that is not alleged to involve an employee, intern, volunteer, contractor or service provider of a department, program or facility, shall be reported to law enforcement or to the appropriate governmental unit as required in Texas Family Code Chapter 261.

§358.440. Reporting of Allegations by Juveniles.

(a) Right to Report. Juveniles in a facility shall have the right to report to the Commission alleged abuse, neglect and exploitation, including death.

(1) Juveniles shall be advised in writing during orientation into the facility of their right to report allegations under this subsection; and

(2) Juveniles shall be advised in writing during orientation into the facility of the Commission's toll-free number available for reporting allegations under this subsection.

(b) Policy and Procedure. Departments, programs and facilities shall have written policies and procedures that address a juvenile's reasonable, free and confidential access to the Commission for reporting allegations under subsection (a) of this section.

(c) Access to the Commission. Upon the request of a juvenile, staff shall facilitate the juvenile's unimpeded access to the Commission to report allegations under subsection (a) of this section.

§358.460. Parental Notification.

(a) Notification. Notification, or diligent efforts to notify, shall be made to the parents, guardians and custodians of a juvenile who has died or who is the alleged victim of alleged abuse, neglect or exploitation.

(b) Time of Notification. The notification, or the diligent efforts to make the notification under subsection (a) of this section, shall be made as soon as possible, but no later than 24 hours from the time a person gains knowledge of or suspects the alleged abuse, neglect, exploitation or death occurred.

(c) Method of Notification. The notification under subsection (a) of this section shall be made by phone, in writing or in person by the administrator or designee.

(d) Documentation of Notification. The notification, or the diligent efforts to make the notification under subsection (a) of this section, shall be documented on the Commission's Incident Report Form or in the internal investigation report.

§358.480. Signage.

(a) Departments, programs and facilities shall prominently display signage provided by the Commission regarding a zero-tolerance policy concerning abuse of juveniles.

(b) Signage under subsection (a) of this section shall be posted in all of the following places:

(1) Lobby or visitation areas of the department, program or facility to which the public has access;

(2) Youth housing and common areas;

(3) Common medical treatment areas;

(4) Common educational areas; and

(5) Other common areas.

(c) Signage under subsection (a) of this section shall be posted in both English and Spanish.

§358.500. Serious Physical Abuse and Sexual Abuse.

(a) Duty to Report. Any person who witnesses, learns of, receives an oral or written statement from an alleged victim or other person with knowledge or who has a reasonable belief as to the occurrence of alleged serious physical abuse or sexual abuse involving a juvenile shall report to the Commission and local law enforcement.

(b) Time to Report.

(1) A report of alleged serious physical abuse or sexual abuse under subsection (a) of this section shall be made to local law enforcement immediately, but no later than one (1) hour from the time a person gains knowledge of or suspects the alleged serious physical abuse or sexual abuse; and

(2) A report of alleged serious physical abuse or sexual abuse under subsection (a) of this section shall be made to the Commission immediately, but no later than four (4) hours from the time a person gains knowledge of or suspects the alleged serious physical abuse or sexual abuse.

(c) Methods for Reporting Serious Physical Abuse and Sexual Abuse.

(1) The initial report shall be made by phone to law enforcement;

(2) The initial report shall be made by phone to the Commission using the toll-free number as designated by the Commission; and

(3) Within 24 hours of the report by phone of alleged serious physical abuse or sexual abuse, the completed Incident Report Form shall be submitted to the Commission by fax or e-mail.

§358.600. Death.

(a) Duty to Report. The administrator or designee shall report to the Commission and local law enforcement the death of a juvenile that:

(1) Occurs on the premises of a department, program, facility; or

(2) Emanates from an illness, incident or injury that occurred, was discovered or reported on the premises of a department, program or facility; or

(3) Occurs while in the presence of a department, program or facility employee, intern, volunteer, contractor or service provider, regardless of the location.

(b) Time to Report.

(1) A report of a death shall be made to local law enforcement immediately, but no later than one (1) hour of the discovery or notification of the death; and

(2) A report of a death shall be made to the Commission immediately, but no later than four (4) hours from the discovery or notification of the death.

(c) Methods for Reporting Death.

(1) The initial report shall be made by phone to law enforcement;

(2) The initial report shall be made by phone to the Commission using the toll-free number as designated by the Commission; and

(3) Within 24 hours of the report by phone of the death of a juvenile the completed Incident Report Form shall be submitted to the Commission by fax or e-mail.

§358.620. Custodial Death Investigation in a Facility.

Upon the death of a juvenile residing in a facility, the administrator shall:

(1) In accordance with Texas Code of Criminal Procedure Article 49.18(b) conduct an investigation of the death; and

(2) The investigation shall be conducted in accordance with §358.700 of this chapter.

§358.640. Custodial Death Investigation Report.

Upon the conclusion of the internal investigation of the custodial death of a juvenile in a facility, the administrator shall:

(1) In accordance with Texas Code of Criminal Procedure Article 49.18(b), file a written report of the cause of death with the state Attorney General no later than 30 days after the juvenile's death;

(2) Submit a copy of the death investigation report in paragraph (1) of this section to the Commission within 10 calendar days of completion; and

(3) Complete an internal investigation report in accordance with §358.800 of this chapter.

§358.660. Custodial Death Investigation in a Department or Program.

Upon the death of a juvenile in custody that occurs in a department or program as described under §358.600(a) of this chapter, the administrator or designee shall:

(1) Initiate an internal investigation in accordance with §358.700 of this chapter; and

(2) Upon the conclusion of the internal investigation, complete an internal investigation report in accordance with §358.800 of this chapter.

§358.680. Non-Custodial Death Investigation in a Department or Program.

Upon the death of a juvenile not in custody that occurs in a department or Program as described under §358.600(a) of this chapter, the administrator or designee shall:

(1) Initiate an internal investigation in accordance with §358.700 of this chapter; and

(2) Upon the conclusion of the internal investigation, complete an internal investigation report in accordance with §358.800 of this chapter.

§358.700. Internal Investigation.

(a) Investigation Requirement. An internal investigation shall be conducted by a person qualified by experience or training to conduct a comprehensive investigation in cases in which abuse, neglect, exploitation or death is alleged to have occurred.

(b) Policy and Procedure. Departments, programs and facilities shall have written policies and procedures for conducting internal investigations of alleged abuse, neglect, exploitation and death.

(c) Conducting the Investigation. The internal investigation shall be conducted in accordance with the policies and procedures of the department, program or facility.

(d) Initiation of Investigation. The internal investigation shall be initiated immediately upon the administrator or designee gaining knowledge of the alleged abuse, neglect, exploitation or death. However, the initiation of the internal investigation shall be postponed if:

- (1) Directed by law enforcement;
- (2) Requested by the Commission; or
- (3) Initiating the internal investigation compromises the integrity of a potential crime scene.

(e) Timeframe for Internal Investigation. The internal investigation shall be completed within 30 business days of the initial report to the Commission. The Commission may extend this timeframe upon request. If an extension is granted, the Commission may request submission of all information compiled to date or a statement of the status of the investigation.

§358.720. Reassignment or Administrative Leave During the Internal Investigation.

(a) Upon gaining knowledge of alleged abuse, neglect or exploitation, and until the finding of the internal investigation is determined, the administrator or designee shall immediately place any person alleged to have abused, neglected or exploited a juvenile on administrative leave or reassign the person to a position having no contact with the alleged victim, relatives of the alleged victim, or other juveniles.

(b) If during the internal investigation the person(s) alleged to have abused, neglected or exploited a juvenile resigns or is terminated from employment, the Commission shall be notified no later than the second business day after the resignation or termination.

(c) If an individual under subsection (b) of this section obtains employment in another jurisdiction prior to the finding of the internal investigation being determined, the person(s) under investigation shall not be placed in a position having any contact with any juveniles until the disposition of the internal investigation is finalized in the county of previous employment.

§358.740. Written and Electronically Recorded Statements.

During the internal investigation, diligent efforts shall be made to obtain written or electronically recorded oral statements from all persons with direct knowledge of the alleged incident.

§358.760. Juvenile Board Responsibilities.

If the administrator is the person alleged to have abused, neglected or exploited a juvenile and the administrator is the highest ranking department, program or facility official, the juvenile board shall:

- (1) Conduct the internal investigation in accordance with §358.700 of this chapter; or
- (2) Appoint an individual to conduct the internal investigation in accordance with §358.700 of this chapter who is not one of the following:
 - (A) The person alleged to have abused, neglected or exploited a juvenile;
 - (B) A subordinate of the person alleged to have abused, neglected or exploited a juvenile; or
 - (C) A law enforcement officer currently acting in the capacity as a criminal investigator for the alleged abuse, neglect, exploitation or death of a juvenile.

§358.780. Corrective Measures.

At the conclusion of the internal investigation, the governing board, the juvenile board, administrator or designee shall take appropriate corrective measures, if warranted, that may include, but are not limited to:

- (1) A review of the policies and procedures pertinent to the alleged incident;
- (2) Revision or modification of any policies or procedures as needed;
- (3) Administrative disciplinary action or appropriate personnel actions against all persons found to have abused, neglected or exploited a juvenile; and
- (4) The provision of additional training for all appropriate persons to ensure the safety of the juveniles, employees, interns, volunteers, contractors and service providers.

§358.800. Internal Investigation Report.

An internal investigation report shall be completed at the conclusion of all internal investigations resulting from alleged abuse, neglect, exploitation or death of a juvenile.

§358.820. Internal Investigation Report Components.

The internal investigation report shall include:

- (1) The date the internal investigation was initiated;
- (2) The date the internal investigation was completed;
- (3) The date the alleged victim's parent, guardian or custodian was notified of the allegation, or documentation that diligent efforts to provide the notification were made;
- (4) A summary of the original allegation;
- (5) Relevant policies and procedures related to the incident;
- (6) A summary or listing of the steps taken during the internal investigation;
- (7) A written summary of the content of all oral interviews conducted;
- (8) A listing of all evidence collected during the internal investigation, including all audio and/or video recordings, polygraph examinations, etc.;
- (9) Relevant findings of the investigation that support the disposition;
- (10) The assigned disposition of the internal investigation:
 - (A) Founded;
 - (B) Unfounded; or
 - (C) Inconclusive.
- (11) The administrative disciplinary action or corrective measures taken to date, if applicable (e.g., termination, suspension, retrained, returned to duty or none, etc.);
- (12) The date the internal investigation report was completed;
- (13) The names of all persons who participated in conducting the internal investigation; and
- (14) The name and signature of the person who submitted the internal investigation report.

§358.840. Submission of Internal Investigation Report.

(a) A copy of the internal investigation report shall be submitted to the Commission within five calendar days following its completion.

(b) The following documentation collected during the internal investigation shall be submitted to the Commission with the internal investigation report:

(1) Written statements;

(2) Relevant medical documentation, if the release is authorized by law;

(3) Training records, if applicable; and

(4) Any other documentation used to reach the disposition of the internal investigation.

§358.900. Cooperation with Commission Investigation.

(a) The juvenile board, administrator or designee shall fully and promptly cooperate with a Commission investigation of alleged abuse, neglect, exploitation or death of a juvenile by providing all evidence requested by the Commission in the format requested.

(b) All persons shall fully cooperate with any investigation of alleged abuse, neglect, exploitation or death of a juvenile.

(c) The juvenile board, administrator or designee shall make a diligent effort to identify and make available for questioning all persons with knowledge of alleged abuse, neglect, exploitation or death which is the subject of a Commission investigation.

§358.920. Redaction of Records.

(a) Request for Redaction. The subject of investigation may request that his or her identifying information be redacted from the Commission's records if:

(1) The Commission's final disposition of the case in which the subject of investigation was involved is "Ruled Out;"

(2) The subject of investigation submits the request for redaction in writing to the Commission's Legal Division;

(3) The subject of investigation submits the request for redaction within 30 calendar days of the last day of the corresponding limitation period described in subsection (b) of this section;

(4) The subject of investigation has been continuously employed within the Texas juvenile justice system for the time period as specified in subsection (b) of this section; and

(5) The subject of investigation has not been named as the subject of investigation in a subsequent case of abuse, neglect or exploitation.

(b) Limitation Periods. A request for redaction may only be made if all requirements of subsection (a) of this section are met and if:

(1) Two years has expired from the date of the Commission's final disposition of "Ruled Out," and if, notwithstanding a violation of the Texas Administrative Code, the investigation of the alleged abuse, neglect or exploitation did not produce evidence of a violation of laws of this state or of the United States;

(2) Three years has expired from the date of the Commission's final disposition of "Ruled Out," if the allegation does not meet the elements of paragraph (1) or (3) of this subsection; or

(3) Five years has expired from the date of the Commission's final disposition of "Ruled Out", if the allegation involved serious physical abuse as defined in §358.100(22) of this chapter or sexual conduct as defined in §358.100(23) - (25) of this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901339

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 424-6682



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 9. MENTAL RETARDATION SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER E. ICF/MR PROGRAMS--CONTRACTING

DIVISION 4. PROVIDER SERVICE REQUIREMENTS

40 TAC §9.228

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §9.228, concerning augmentative communication device systems (ACDs), in Chapter 9, Mental Retardation Services--Medicaid State Operating Agency Responsibilities.

BACKGROUND AND PURPOSE

The purpose of the proposed new section is to provide requirements that a program provider in the Intermediate Care Facility for Persons with Mental Retardation (ICF/MR) Program must comply with to request authorization from DADS to purchase an ACD for an ICF/MR resident and to receive reimbursement for the ACD. The new section will also make the ICF/MR Program rules consistent with Nursing Facility Program rules regarding ACDs. Currently, a non-state operated ICF/MR program provider must pay for durable medical equipment, including an ACD, that costs less than \$1000 from the per-diem rate paid to the program provider. In addition, for durable medical equipment that costs more than \$5000, the program provider must pay the amount over \$5000. The new section will allow an ICF/MR program provider to request authorization to purchase an ACD and, if such authorization is granted, receive full reimbursement for the ACD, without any specific limitations on the cost.

ICF/MR program providers and advocacy groups report that the current ACD reimbursement policy may prevent some ICF/MR residents from receiving ACDs that they need. Since 2000, reimbursement for less than five ACDs costing over \$1000 has been requested by ICF/MR program providers.

SECTION-BY-SECTION SUMMARY

Proposed new §9.228 provides the requirements an ICF/MR program provider must follow to receive reimbursement for an ACD purchased for an ICF/MR resident.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new section is in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed new section is in effect is an estimated additional cost of \$6,071 in fiscal year (FY) 2009; \$74,412 in FY 2010; \$75,348 in FY 2011; \$75,348 in FY 2012; \$75,348 in FY 2013; and \$69,069 in FY 2014.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed new section will not have an adverse economic effect on small businesses or micro-businesses, because the proposed new section does not add any costs to program providers.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the new section is in effect, the public benefit expected as a result of enforcing the new section is that residents of ICFs/MR will be able to more fully access medically necessary ACDs. In addition, consistency between ICF/MR and Nursing Facility Program rules may eliminate potential confusion regarding the availability of reimbursement for ACDs.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the new section. The new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Katharine McCormick at (512) 438-4385 in DADS' Provider Services Section. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-037, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 037" in the subject line.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The new section affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§9.228. Augmentative Communication Device System.

(a) A specialized augmentative communication device system (ACD), also referred to as a speech-generating device system, is reimbursable if purchased by a program provider for a resident and all requirements of this section are met.

(b) A program provider must request and receive authorization from DADS before purchasing an ACD, referred to in this section as "prior authorization." The request for prior authorization must include:

(1) an evaluation and recommendation from a licensed speech therapist to purchase the ACD;

(2) a signed statement from the resident's attending physician that the ACD is medically necessary for the resident to maximize his functional communication; and

(3) a minimum of two bids for the ACD or a request for an exception to the two-bid minimum if the recommended ACD is available through only one vendor.

(c) The evaluation and recommendation from the licensed speech therapist must include:

(1) a description of how the ACD will specifically meet the needs of the resident;

(2) detailed instructions for training on the use of the ACD for the resident, program provider staff, and resident's family (if applicable);

(3) a diagnosis relevant to the need for the ACD; and

(4) the specific ACD being recommended.

(d) If an ACD costs more than \$10,000, DADS facilitates an independent speech language review, at DADS' expense, to determine necessity for the ACD.

(e) After receiving prior authorization from DADS, the program provider must purchase the ACD.

(f) To obtain reimbursement from DADS, a program provider must submit to DADS the receipt for payment for the ACD and a copy of the prior authorization from DADS.

(1) A program provider must fully investigate and use funding sources to pay for an ACD before submitting the request for reimbursement to DADS. If another funding source will pay for part of the cost of the ACD, the program provider may request reimbursement from DADS for the balance of the cost if the requirements in subsections (b) and (c) of this section are met. If another funding source is available, DADS reimburses the program provider no more than the balance remaining after other sources are used fully.

(2) A program provider must submit the request for reimbursement to DADS within one year after the date of purchase.

(3) DADS reimburses the amount of the authorized bid or the balance remaining after all other sources are used fully.

(g) If DADS denies a request for reimbursement because the program provider did not receive prior authorization or did not submit the necessary documentation for the ACD, the program provider is responsible for the cost of the ACD.

(h) If DADS denies a prior authorization request, the resident may request a Medicaid fair hearing in accordance with 1 TAC Chapter 357, Subchapter A.

(i) Only the resident may use the ACD, and the program provider must identify the ACD as the personal property of the resident.

(1) Upon discharge from the facility, the resident must retain the ACD. If the resident dies, the ACD must be transferred to the resident's estate. If the ACD is donated or sold to the program provider by the resident or the resident's estate, the program provider must document the transaction.

(2) The program provider is responsible for repairing and maintaining the ACD while the resident resides in the facility.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901347

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734



CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §§19.201, 19.210, 19.214

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.201, concerning criteria for licensing; §19.210, concerning change of ownership license; and §19.214, concerning criteria for denying a license or renewal of a license, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies, elsewhere in this issue of the *Texas Register*. As part of the proposal for the

Chapter 19 rules, DADS proposes to amend the licensing rules for nursing facilities to reference new Chapter 99.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.201 updates cross references and adds references to new Chapter 99. The amendment deletes subsection (d), which is obsolete. The amendment adds language to clarify and improve the section.

The proposed amendment to §19.210 updates rule cross references and improves and clarifies rule language.

References to "filing" an application, in §19.201 and §19.210, were changed to "submitting" an application, which clarifies and improves the accuracy of the section.

The proposed amendment to §19.214 adds a cross reference to new Chapter 99 and updates rule cross references. The amendment also adds language to clarify and improve the section.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require a nursing facility to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS will have clearer rules that are consistent across licensure types.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or

shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§242.001 - 242.906.

§19.201. *Criteria for Licensing.*

(a) A person or governmental unit, acting jointly or severally, must be licensed by DADS to establish, conduct, or maintain a facility.

(b) An applicant for a license must submit a complete application form and license fee to DADS.

(c) No person may apply for a probationary license, a license, change of ownership, increase in capacity, or renewal of a nursing facility license without making a disclosure of information as required in this section.

~~[(d) In respect to all licenses in effect after December 31, 1999, all services provided under licensure by DADS are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware, or imbedded logic unable to recognize different centuries or more than one century on or after January 1, 2000.]~~

(d) ~~[(e)]~~ An applicant for a license must affirmatively show that:

~~[(1) the applicant and all persons required to submit background information do not have state or federal criminal convictions for any offense that provides a penalty of incarceration;]~~

(1) ~~[(2)]~~ the applicant or license holder has the ability to comply with:

(A) minimum standards of medical care, nursing care and financial condition; and

(B) any other applicable state or federal standard;

(2) ~~[(3)]~~ the facility meets the standards of the Life Safety Code;

(3) ~~[(4)]~~ the facility meets the construction standards in Subchapter D of this chapter (relating to Facility Construction); and

(4) ~~[(5)]~~ the facility meets the standards for operation based on an on-site survey.

(e) ~~[(f)]~~ Before issuing a license, DADS considers the background and qualifications of:

(1) the applicant or license holder;

(2) a partner, officer, director, or managing employee of the applicant or license holder;

(3) a person who owns or who controls the owner of the physical plant of a facility in which the nursing facility operates or is to operate; and

(4) a controlling person with respect to the nursing facility for which a license or license renewal is requested.

(f) ~~[(g)]~~ In making the evaluation required by subsection (e) ~~[(f)]~~ of this section, DADS requires the applicant or license holder to submit [file] a sworn affidavit of a satisfactory compliance history and any other information required by DADS to substantiate a satisfactory compliance history relating to each state or other jurisdiction in which persons [the applicant or license holder and other person] described in subsection (e) ~~[(f)]~~ of this section operated a long-term care facility during the five-year period preceding the date on which the application is made. For purposes of the sworn affidavit of a satisfactory compliance history, the applicant will be considered to have complied with the submission [filing] requirement (but not necessarily be entitled to a license) if the applicant swears or affirms that all the information disclosed in the application concerning previous state and federal nursing facility sanctions and penalties and related information are true and correct. The affidavit of compliance history is contained in DADS' application form.

(g) ~~[(h)]~~ A license is issued if, after inspection and investigation, DADS finds that the [the applicant or license holder, and any other] persons described in subsection (e) ~~[(f)]~~ of this section meet [meets] all requirements of this chapter. The license is valid for two years. Each license specifies the maximum allowable number of residents. The number of residents authorized by the license must not be exceeded.

(h) ~~[(i)]~~ In making a determination whether to grant a nursing facility license, DADS reviews:

(1) the information contained in the application; ~~[and]~~

(2) the criminal history information of the persons described in subsection (e) of this section; and

(3) ~~[(2)]~~ other documents DADS deems relevant, including survey and complaint investigation findings in each facility the applicant or any other person named in subsection (e) ~~[(f)]~~ of this section has been affiliated with during the last five years.

§19.210. *Change of Ownership License.*

(a) A license holder may not transfer the license as part of a change of ownership. If there is a change of ownership, the license holder's license becomes invalid on the date of the change. The new owner must obtain a change of ownership license in accordance with subsection (b) of this section. The license holder and new license applicant must notify the Department of Aging and Disability Services before a change of ownership occurs.

(1) Sole proprietor. A change of ownership occurs if:

(A) the sole proprietor who is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity not licensed to operate the facility; or

(B) upon the death of the sole proprietor, the facility continues to operate.

(2) General Partnership (as defined in the Texas Business Organization Code, §1.002). A change of ownership occurs if:

(A) a partner of a general partnership that is licensed to operate the facility is added or substituted;

(B) the partnership that is licensed to operate the facility is sold or otherwise transferred to an entity that is not licensed to operate the facility;

(C) the entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility;

(D) for any reason other than correction of an error, the federal taxpayer identification number changes; or

(E) the entity that is licensed to operate the facility is terminated and fails or is ineligible to be reinstated, and the facility continues to operate.

(3) Limited Partnership (as defined in the Texas Business Organization Code, §1.002). A change of ownership occurs if:

(A) a general partner of a limited partnership that is licensed to operate the facility is added or substituted;

(B) ownership of the limited partnership that is licensed to operate the facility changes by 50% or more and one or more controlling person is added;

(C) the partnership that is licensed to operate the facility is sold or otherwise transferred to an entity that is not licensed to operate the facility;

(D) the entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility;

(E) for any reason other than correction of an error, the federal taxpayer identification number changes; or

(F) the entity that is licensed to operate the facility is terminated and fails or is ineligible to be reinstated, and the facility continues to operate.

(4) Nonprofit organization. A change of ownership occurs if:

(A) the nonprofit organization that is licensed to operate the facility is sold or otherwise transferred to an entity that is not licensed to operate the facility;

(B) the entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility;

(C) for any reason other than correction of an error, the federal taxpayer identification number changes; or

(D) the entity that is licensed to operate the facility is terminated and fails or is ineligible to be reinstated, and the facility continues to operate.

(5) For-profit corporation or limited liability company. A change of ownership occurs if:

(A) ownership of the business entity that is licensed to operate the facility changes by 50% or more and one or more controlling person is added;

(B) the business entity that is licensed to operate the facility is sold or otherwise transferred to an entity that is not licensed to operate the facility;

(C) the entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility;

(D) for any reason other than correction of an error, the federal taxpayer identification number changes; or

(E) the entity that is licensed to operate the facility is terminated and fails or is ineligible to be reinstated, and the facility continues to operate.

(6) City, county, state or federal government authority, hospital district, or hospital authority. A change of ownership occurs if:

(A) the governmental entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility; or

(B) the entity that is licensed to operate the facility is terminated and the facility continues to operate.

(7) Trust, living trust, estate or any other entity type not included in paragraphs (1) - (6) of this subsection. A change of ownership occurs if:

(A) the entity that is licensed to operate the facility is sold or otherwise transferred to an entity that is not licensed to operate the facility;

(B) the entity that is licensed to operate the facility sells or otherwise transfers its business of operating the facility to an entity that is not licensed to operate the facility;

(C) for any reason other than correction of an error, the federal taxpayer identification number changes; or

(D) the entity that is licensed to operate the facility is terminated and the facility continues to operate.

(8) For license holders that have multiple-level ownership structures, a change of ownership also occurs if any action described in paragraphs (1) - (7) of this subsection occurs at any level of the license holder's entire ownership structure.

(9) For paragraphs (3)(B) and (5)(A) of this subsection, the substitution of the executor of a decedent's estate for a decedent is not the addition of a controlling person.

(10) A conversion as described in Subchapter C of Chapter 10 of the Texas Business Organization Code is not a change of ownership if no controlling person is added.

(b) The prospective new owner must submit to DADS:

(1) a complete application for a change of ownership license under §19.201 of this subchapter (relating to Criteria for Licensing) or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information;

(2) the application fee, in accordance with §19.216 of this subchapter (relating to License Fees); and

(3) signed, written notice from the facility's existing license holder of his intent to transfer operation of the facility to the applicant beginning on a date specified by the applicant.

(c) To avoid a facility operating while unlicensed, an applicant must submit all items in subsection (b) of this section at least 30 days before the anticipated date of the sale or other transfer to the new owner. DADS considers an [An] application as submitted [is considered] timely [filed] if the application is postmarked at least 30 days before the anticipated date of the sale or other transfer to the new owner [by the filing deadline] and received in DADS' Licensing and Credentialing Section, Regulatory Services Division within 15 days after the date of the postmark.

(d) The 30-day notification from the applicant or the 30-day notification from the existing license holder or both may be waived if DADS determines that the applicant presented evidence showing that circumstances prevented the submission of the 30-day notice and if DADS determines that not waiving the 30-day notification would create a threat to resident welfare or health and safety. If the applicant submits ~~[has filed]~~ a timely and sufficient application for a change of ownership license and meets all requirements for a license, DADS issues a change of ownership license effective on the date requested by the applicant.

(e) A change of ownership license is a 90-day temporary license issued to an applicant who proposes to become the new operator of a nursing facility that exists on the date the application is submitted ~~[filed]~~. Upon receipt of a complete application, fee, and signed, written notice from the facility's existing license holder of the intent to transfer the operation of the facility to the applicant beginning on a date specified by the applicant, DADS issues a change of ownership license to the prospective new owner if DADS finds that the prospective new owner and any other persons listed in §19.201(e) [§19.201(f)] of this subchapter meet the requirements in §19.201(d)(1) and (f) [§19.201(e)(2) and (g)] of this subchapter.

(1) All applications must be made on forms prescribed by and available from DADS. Each application must be completed in accordance with DADS' instructions, signed, and notarized, and must contain all forms required by DADS.

(2) DADS approves or denies an application for a change of ownership license not later than the 31st day after the date of receipt of the complete application, fee, and signed, written notice from the facility's existing license holder of his intent to transfer the operation of the facility to the applicant beginning on a date specified by the applicant. The effective date of the license is the later of the date requested in the application or the 31st day after the date DADS receives the application, fee, and signed, written notice from the existing license holder, unless waived in accordance with subsection (d) of this section. The effective date of the change of ownership license cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division.

(3) If the applicant meets the requirements of §19.201 of this subchapter and passes an initial inspection, desk review, or a subsequent inspection before the change of ownership license expires, a regular two-year license is issued. The effective date of the regular two-year license is the same date as the effective date of the change of ownership and cannot precede the date the application is received by DADS' Licensing and Credentialing Section, Regulatory Services Division.

(4) When an applicant has not previously held a license in Texas, a probationary license is issued following the change of ownership license. The effective date of the probationary one-year license is the same date as the change of ownership license and cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division.

(5) A change of ownership license expires on the 90th day after its effective date.

(6) DADS conducts an on-site inspection to verify compliance with the requirements after issuing a change of ownership license.

(7) DADS may allow a desk review in lieu of an on-site inspection or survey if:

(A) the facility specifically requests a desk review and submits evidence during the application process that no new controlling person is added;

(B) DADS determines the change does not involve a new controlling person; and

(C) the facility meets the standards for operation based on the most recent on-site inspection.

(f) A nursing facility license holder may be eligible to acquire, on an expedited basis, a license to operate another existing nursing facility. A license holder that appears on the expedited change of ownership list may be granted expedited approval in obtaining a change of ownership license to operate another existing nursing facility in Texas.

(1) DADS maintains and keeps current a list of nursing facility license holders that operate an institution in Texas and that have met the criteria to qualify for an expedited change of ownership according to the information available to DADS.

(2) In order to establish and maintain the expedited change of ownership list, DADS uses the criteria found in §19.2322(e) of this chapter (relating to Medicaid Bed Allocation Requirements). A nursing facility license holder meeting these criteria appears on the list and is eligible to be issued, on an expedited basis, a change of ownership license to operate another existing institution in Texas.

(3) A nursing facility license holder appearing on the list must submit an affidavit that demonstrates the license holder continues to meet the criteria established for being listed on the expedited change of ownership list, and continues to meet the requirements in §19.201(d)(1) and (f) [§19.201(e)(2) and (g)] of this subchapter.

(4) DADS processes a change of ownership license application on an expedited basis for a nursing facility license holder on the list if DADS finds that the license holder and any other persons listed in §19.201(e) [§19.201(f)] of this subchapter meet the requirements in §19.201(d)(1) and (f) [§19.201(e)(2) and (g)] of this subchapter.

(5) If the nursing facility license holder requesting a change of ownership license on an expedited basis complies with subsections (b) - (e) of this section, DADS approves or denies the application for a change of ownership license not later than the 15th day after the date of receipt of the complete application, fee, and signed, written notice from the facility's existing license holder of the intent to transfer the operation of the facility to the applicant beginning on a date requested in the application. The effective date of the license is the later of the date requested in the application or the 31st day after the date DADS receives the application fee, and signed, written notice from the existing license holder, unless waived in accordance with subsection (d) of this section. The effective date of the change of ownership license cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division.

(6) An applicant for a change of ownership license on an expedited basis must meet all applicable requirements that an applicant for renewal of a license must meet. Any requirement relating to inspections or to an accreditation review applies only to institutions operated by the license holder at the time the application is made for the change of ownership license.

(g) If a license holder changes its name, but does not undergo a change of ownership, the license holder must notify DADS and submit a copy of a certificate of amendment from the Secretary of State's office. On receipt of the certificate of amendment, the current license will be re-issued in the license holder's new name.

§19.214. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if ~~[an applicant, or]~~ any person described in §19.201(e) of this subchapter (relating to Criteria for Licensing) [required to submit background and qualification information]:

(1) has been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure) during the time frames described in that chapter;

(2) ~~[(4)]~~ does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DADS at a minimum may consider:

(A) whether any violation resulted in significant harm or a serious and immediate threat to the health, safety, or welfare of any resident;

(B) whether the person promptly investigated the circumstances surrounding any violation and took steps to correct and prevent a recurrence of a violation;

(C) the history of surveys and complaint investigation findings and any resulting enforcement actions;

(D) a repeated failure to comply with regulation;

(E) an inability to attain compliance with cited deficiencies within an acceptable period of time as specified in the plan of correction or credible allegation of compliance, whichever is appropriate;

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(e) ~~[\$19.201(f)]~~ of this subchapter ~~[(relating to Criteria for Licensing)]~~ has been affiliated with during the last five years; and

(G) any exculpatory information deemed relevant by DADS;

(3) ~~[(2)]~~ has committed any act described in §19.2112(a)(2) - (7) of this chapter (relating to Administrative Penalties);

(4) ~~[(3)]~~ violated Chapter 242 of the Texas Health and Safety Code in either a repeated or substantial manner;

(5) ~~[(4)]~~ aids, abets, or permits a substantial violation described in paragraph (4) ~~[(3)]~~ of this subsection about which the person had or should have had knowledge;

(6) ~~[(5)]~~ fails to provide the required information and facts and/or references;

(7) ~~[(6)]~~ fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §19.216 of this subchapter (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year after the date on which the funds were received by the trustee in accordance with the provisions of §19.2116(e) and (f) of this chapter (relating to Involuntary Appointment of a Trustee); or

(C) franchise taxes;

(8) ~~[(7)]~~ has a history of [discloses] any of the following actions during [within] the five-year period preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract canceled under the Medicare or Medicaid program in any state or both;

(B) federal or state nursing facility sanctions or penalties, including, but not limited to, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction or the denial of payment for new Medicaid admissions;

~~[(C)] state or federal criminal convictions for any offense that provides a penalty of incarceration;~~

(C) ~~[(D)]~~ unsatisfied final judgments;

(D) ~~[(E)]~~ eviction involving any property or space used as a facility in any state;

(E) ~~[(F)]~~ suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility in any state;

(F) ~~[(G)]~~ revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(G) ~~[(H)]~~ surrender of a license in lieu of revocation or while a revocation hearing is pending; or

(H) ~~[(I)]~~ expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(9) ~~[(8)]~~ fails to meet minimum standards of financial condition as described in §19.201(d)(1)(A) of this subchapter ~~[\$19.201(e)(2)(A) of this chapter]~~ and §19.1925(a) of this chapter (relating to Financial Condition); or

(10) ~~[(9)]~~ fails to notify DADS of a significant adverse change in financial condition as required under §19.1925 of this chapter.

(b) DADS does not issue a license to an applicant to operate a new facility if the applicant has a history of [discloses] any of the following actions during the five-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(2) surrender of a license in lieu of revocation or while a revocation hearing is pending;

(3) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(4) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(5) a court injunction prohibiting the applicant or manager from operating a facility.

(c) Only final actions are considered for purposes of subsections (a)(8) ~~[(a)(7)]~~ and (b) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(d) If an applicant for a new license owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities ~~[will be examined]~~. Denial of an application for a new license will not preclude the renewal of licenses for ~~[of other of]~~ the applicant's other facilities with satisfactory records.

(e) If DADS denies a license or refuses to issue a renewal of a license, the applicant or license holder may request an administrative hearing. Administrative hearings are held under the Health and Human Services Commission's ~~[format]~~ hearing procedures in 1 TAC~~[-]~~ Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734



CHAPTER 51. MEDICALLY DEPENDENT CHILDREN PROGRAM

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §51.235, concerning consumer directed services (CDS) option, §51.401, concerning contracting requirements, and §51.441, concerning service delivery requirements for CDS, in Chapter 51, Medically Dependent Children Program (MDCP).

BACKGROUND AND PURPOSE

Currently in MDCP, an individual may choose to participate in CDS, a payment option for direct care services that allows the individual or the individual's parent or guardian to recruit, hire, manage, and terminate the individual's attendant. By removing the requirement that only an attendant provide direct care services in the CDS option, the proposed amendments expand the CDS option in the MDCP to include registered nurses (RNs) and licensed vocational nurses (LVNs) as providers of direct care services.

The proposal also amends contracting requirements by removing RNs and LVNs as independent contractors with DADS in MDCP. DADS began contracting with independent nurses prior to the development of the CDS option. Now that CDS has been expanded to include services provided by nurses, it is no longer necessary for DADS to contract directly with nurses.

SECTION-BY-SECTION SUMMARY

The amendment to §51.235 removes the requirement that only an attendant provide respite and adjunct support services in the CDS option, thereby allowing RNs and LVNs to provide those services.

The amendment to §51.401 removes language that allows LVNs and RNs to independently contract with DADS.

The amendment to §51.441 removes the requirement that only an attendant provide respite and adjunct support services in the CDS option, thereby allowing RNs and LVNs to provide those services.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments do not add any new requirements for providers.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that families receiving MDCP services will have more options concerning whom they choose to employ in the CDS option. The CDS option replaces independently-contracted nurses.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Lori Roberts at (512) 438-5391 in DADS' Provider Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-038, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 038" in the subject line.

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND SERVICES DIVISION 3. SERVICES

40 TAC §51.235

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§51.235. Consumer Directed Services Option.

An individual may choose to participate in a payment option that allows the individual or the individual's parent or guardian to direct the recruiting, hiring, management, and termination ~~[firing]~~ of the individual's attendant or nurse as described in Chapter 41 of this title (relating to Consumer Directed Services Option ~~[Vendor Fiscal Intermediary Payments]~~). The consumer directed services option is available only for respite or adjunct support services ~~[provided by an attendant]~~.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734



SUBCHAPTER D. PROVIDER REQUIREMENTS

DIVISION 1. CONTRACTING REQUIREMENTS

40 TAC §51.401

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§51.401. Contracting Requirements.

(a) (No change.)

(b) Specific contracting requirements.

(1) (No change.)

~~[(2) An independently contracted LVN must be licensed by the BNE or hold a license from another state recognized by the BNE to practice vocational nursing in Texas. An independently contracted RN must be licensed by the BNE or hold a license from another state recognized by the BNE to practice professional nursing in the state of Texas.]~~

~~(2) [(3)] A host family must be licensed as a foster home by DFPS or verified by a child-placing agency that is licensed by DFPS.~~

~~(3) [(4)] An adaptive aid provider must be:~~

~~(A) enrolled with DADS as a provider of durable medical equipment;~~

~~(B) an entity that sells its products directly; and~~

~~(C) approved by the Department of Assistive and Rehabilitative Services to install van lifts (if applicable).~~

~~(4) [(5)] A minor home modification provider must be a general contractor registered with the Texas Residential Construction Commission.~~

~~(5) [(6)] A provider contracted to provide consumer directed services must comply with the requirements in Chapter 41 of this title (relating to Consumer Directed Services Option ~~[Vendor Fiscal Intermediary Payments]~~).~~

~~(6) [(7)] A transition assistance services provider must meet the requirements in Chapter 62 of this title (relating to Contracting to Provide Transition Assistance Services).~~

~~(7) [(8)] A camp must be licensed and accredited by the American Camping Association.~~

~~(8) [(9)] Other entities that contract to provide MDCP services must maintain any applicable license.~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734



DIVISION 5. SERVICE DELIVERY REQUIREMENTS FOR CONSUMER DIRECTED SERVICES

40 TAC §51.441

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§51.441. Consumer Directed Services.

(a) (No change.)

(b) The consumer directed services payment option may only be used for respite or adjunct support services [provided by an attendant].

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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CHAPTER 79. LEGAL SERVICES

SUBCHAPTER OO. GUARDIANSHIPS

40 TAC §§79.4001 - 79.4006

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter OO, consisting of §§79.4001 - 79.4006, concerning guardianships, in Chapter 79, Legal Services.

BACKGROUND AND PURPOSE

The purpose of the repeal is to eliminate rules governing guardianships in the Aid to Families with Dependent Children Program (AFDC) program. The AFDC program, now known as Temporary Assistance for Needy families (TANF), is administered by HHSC, and, therefore, DADS no longer needs these rules in the rule base.

SECTION-BY-SECTION SUMMARY

The repeal of §79.4001 will eliminate obsolete rules governing guardianships in the AFDC program, which is not administered by DADS.

The repeal of §79.4002 will eliminate obsolete rules governing procedures for processing a guardianship.

The repeal of §79.4003 will eliminate obsolete rules governing checkpoints to be considered on letters of guardianship.

The repeal of §79.4004 will eliminate obsolete rules governing name changes and new guardians.

The repeal of §79.4005 will eliminate obsolete rules governing accountability of guardians.

The repeal of §79.4006 will eliminate obsolete rules governing out-of-state guardians.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeal will have no adverse economic effect on small businesses or micro-businesses, because DADS no longer administers TANF, formerly known as the AFDC program, and the rule is no longer necessary. There is no fiscal impact on small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Lawrence Parker, DADS Chief Operating Officer, has determined that, for each year of the first five years after the repeal, the public benefit expected as a result of repealing the sections is that the DADS rule base will not contain unnecessary rules.

Mr. Parker anticipates that there will not be an economic cost to persons who are affected by the repeal. The repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Nancy Porter at (512) 438-4820 in DADS' Legal Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-036, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030 or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 036" in the subject line.

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal affects Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§79.4001. *Guardianships in AFDC.*

§79.4002. *Procedures for Processing a Guardianship.*

§79.4003. *Check Points To Be Considered on Letters of Guardianship.*

§79.4004. *Name Change or New Guardian.*

§79.4005. *Accountability of Guardians.*

§79.4006. *Out-of-State Guardians.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §90.11, §90.17

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §90.11, concerning criteria for licensing, and §90.17, concerning criteria for denying a license or renewal of a license, in Chapter 90, Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies, elsewhere in this issue of the *Texas Register*. As part of the proposal for the Chapter 99 rules, DADS proposes to amend the licensing rules for intermediate care facilities for persons with mental retardation or related conditions (ICFs/MR) to reference new Chapter 99.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §90.11 adds language regarding whose background and qualifications DADS considers before issuing a license to operate an ICF/MR. The amendment also updates cross references, deletes an obsolete provision, adds a reference to new Chapter 99, and replaces references to the Texas Department of Human Services or DHS with references to DADS.

The proposed amendment to §90.17 updates cross references, adds a reference to new Chapter 99, and replaces references to the Texas Department of Human Services or DHS with references to DADS. The amendment also adds language to clarify and improve the section.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require an ICF/MR to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS will have clearer rules that are consistent across licensure types.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code,

Chapter 252, which authorizes DADS to license and regulate ICFs/MR.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§252.001 - 252.181.

§90.11. Criteria for Licensing.

(a) A person or governmental unit, acting jointly or severally, must be licensed by DADS [the Texas Department of Human Services (DHS)] to establish, conduct, or maintain a facility in this state.

(b) An applicant for a license must submit a complete application form and license fee to DADS [the department].

(c) An applicant for a license must affirmatively show that:

~~[(1) the applicant, person with a disclosable interest, affiliate, and manager do not have state or federal criminal convictions for any offense that provides a penalty of incarceration;]~~

(1) [(2)] the facility meets the standards of the Life Safety Code;

(2) [(3)] the facility meets the construction standards in Subchapter D of this chapter (relating to Facility Construction); and

(3) [(4)] the facility meets the standards for operation based on an on-site survey; [; and]

~~[(5) with respect to all licenses in effect after December 31, 1999, all services provided under licensure by DHS will not constitute, as a condition of licensure, a threat to the health and safety of residents as a result of computer software, firmware, or computer logic unable to recognize different centuries or more than one century on or after January 1, 2000.]~~

(d) Before issuing a license, DADS considers the background and qualifications of:

(1) the applicant or license holder;

(2) a person with a disclosable interest;

(3) an affiliate of the applicant or license holder; and

(4) a manager.

(e) ~~[(4)]~~ DADS issues a license if it finds that the facility and any person described in subsection (d) of this section ~~[A license is issued to a facility that]~~ meets all requirements of this chapter. The license [and] is valid for two years. Each license specifies the maximum allowable number of residents to be cared for at any one time. The number of residents authorized by the license must not be exceeded.

§90.17. Criteria for Denying a License or Renewal of a License.

(a) DADS ~~[The Texas Department of Human Services (DHS)]~~ may deny an initial license or refuse to renew a license if any person described in §90.11(d) of this subchapter (relating to Criteria for Licensing) [an applicant, manager, or affiliate]:

(1) has been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure) during the time frames described in that chapter;

(2) [(4)] substantially fails to comply with the requirements described in §90.42 of this chapter [title] (relating to Standards for Facilities Serving Persons with Mental Retardation or Related Conditions), including[; but not limited to]:

(A) noncompliance that poses a serious threat to health and safety, as described in Appendix Q of the State Operations Manual, "Guidelines for Determining Immediate and Serious Threat to Patient Health and Safety[;]" or

(B) a failure to maintain compliance on a continuous basis, including[; but not limited to,] decertification, contract termination, denial of certification, or license revocation;

(3) [(2)] aids, abets, or permits a substantial violation described in paragraph (2) [(4)] of this subsection about which the person [applicant, manager, or affiliate] had or should have had knowledge;

(4) [(3)] fails to provide the required information, facts, or [and/or] references;

(5) [(4)] provides the following false or fraudulent information:

(A) knowingly submits false or intentionally misleading statements to DADS [DHS];

(B) uses subterfuge or other evasive means of filing;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact; or

(E) is responsible for fraud;

(6) [(5)] fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §90.19 of this subchapter [title] (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year ~~after [from]~~ the date on which the funds were received by the trustee in accordance with the provisions of §90.238(e) of this chapter ~~[§90.263(e) of this title]~~ (relating to Involuntary Appointment of a Trustee);

(C) administrative penalties within 60 days ~~after [of]~~ the order assessing the penalties in accordance with §90.236 of this chapter ~~[title]~~ (relating to Administrative Penalties); or

(D) franchise taxes;

(7) [(6)] has a history of [discloses] any of the following actions during [within] the two-year period preceding the date of the application:

(A) operation of a facility that has been decertified or [and/or] had its contract cancelled under the Medicare or Medicaid program in any state;

(B) federal or state long term care facility sanctions or penalties, including[; but not limited to,] vendor holds, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction, or the denial of payment for new Medicaid admissions;

~~[(C) state or federal criminal convictions for any offense that provides a penalty of incarceration;]~~

(C) [(D)] unsatisfied final judgments;

(D) [(E)] eviction involving any property or space used as a facility in any state; or

(E) [(F)] suspension of a license to operate a health care facility, long term care facility, assisted living [personal care] facility, or a similar facility in any state.

(b) Concerning subsection (a)(7) ~~[(a)(6)]~~ of this section, DADS [DHS] may consider exculpatory information provided by any person described in §90.11(d) of this subchapter [the applicant, manager, or affiliate] and grant a license [under subsection (a)(6)] if

DADS [DHS] finds that person [the applicant, license holder, manager, or affiliate] able to comply with the rules in this chapter.

(c) DADS does [DHS shall] not issue a license to an applicant to operate a new facility if the applicant has a history of [discloses] any of the following actions during the two-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long term care facility, assisted living [personal care] facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting any person described in §90.11(d) of this subchapter [the applicant or manager] from operating a facility.

(d) Only final actions are considered for purposes of subsections (a)(7) [(a)(6)] and (c) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(e) If an applicant for a new license owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities [will be examined]. Denial of a new license will not preclude the renewal of licenses for the applicant's other [of other individual] facilities with a history of compliance with licensing regulations.

(f) DADS does [DHS will] not approve as meeting licensing standards new beds or the expansion of a facility serving persons with mental retardation or related conditions that participates in the medical assistance program under Title XIX of the Social Security Act, as provided by the Texas Health and Safety Code, §533.062, unless the new beds or the expansion was included in the plan approved by the Health and Human Services Commission (HHSC) in accordance with Texas Health and Safety Code, §533.061.

(g) If DADS [DHS] denies an application for a new license, the applicant may request an administrative hearing. If DADS [DHS] refuses to issue a renewal of a license, the licensee may request an informal reconsideration, as specified in §90.18 of this subchapter [title] (relating to Informal Reconsideration) and an administrative hearing. An administrative hearing is held under HHSC's rules in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) [Administrative hearings will be held in accordance with DHS's formal hearing procedures under §§79.1601 - 79.1614 of this title (relating to Formal Hearings) and the Administrative Procedures Act (APA), Title 10 of the Texas Government Code, §§2001.051 et seq].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.11

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §92.11, concerning criteria for licensing, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies, elsewhere in this issue of the *Texas Register*. As part of the proposal for the Chapter 99 rules, DADS proposes to amend the licensing rules for assisted living facilities to reference new Chapter 99.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.11(h)(3) corrects a rule cross-reference.

The proposed amendment to §92.11(h)(9) adds a cross reference to new Chapter 99.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses, because the amendments will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require assisted living facilities to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that DADS will have clearer rules that are consistent across licensure types.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code §§247.001 - 247.068.

§92.11. *Criteria for Licensing.*

(a) A person must be licensed to establish or operate an assisted living facility in Texas.

(1) An assisted living facility is an establishment that:

(A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(B) provides personal care services.

(2) DADS considers one or more facilities to be part of the same establishment and, therefore, subject to licensure as an assisted living facility, based on the following factors:

(A) common ownership;

(B) physical proximity;

(C) shared services, personnel, or equipment in any part of the facilities' operations; and

(D) any public appearance of joint operations or of a relationship between the facilities.

(3) The presence or absence of any one factor in paragraph (2) of this subsection is not conclusive.

(b) To obtain a license, a person must follow the application requirements in this subchapter and meet the criteria for a license.

(c) An applicant must affirmatively show that the applicant, license holder, controlling person, and any person required to submit

background and qualification information meet the criteria and eligibility for licensing, in accordance with this section, and:

(1) affirmatively show that:

(A) the building in which the facility is housed:

(i) meets local fire ordinances;

(ii) is approved by the local fire authority; and

(iii) meets DADS licensing standards in accordance with Subchapter D of this chapter (relating to Facility Construction) based on an on-site inspection by DADS; and

(B) operation of the facility meets DADS licensing standards based on an on-site health inspection by DADS, which must include observation of the care of a resident; or

(2) affirmatively show that the facility meets the standards for accreditation based on an on-site accreditation survey by the accreditation commission.

(d) An applicant that chooses the option allowed in subsection (c)(2) of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (c)(2) of this section.

(e) DADS issues a license to a facility meeting all requirements of this chapter. The facility must not exceed the maximum allowable number of residents specified on the license.

(f) DADS denies an application for an initial license or for the renewal of a license if:

(1) the applicant, license holder, controlling person, or any person required to submit background and qualification information has been debarred or excluded from the Medicare or Medicaid programs by the federal government or a state;

(2) a court has issued an injunction prohibiting the applicant, license holder, controlling person, or any person required to submit background and qualification information from operating a facility; or

(3) during the five years preceding the date of the application, a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state held by the applicant, license holder, controlling person, or any person required to submit background and qualification information has been revoked.

(g) A license holder or controlling person who operates a nursing facility or an assisted living facility for which a trustee was appointed and for which emergency assistance funds, other than funds to pay the expenses of the trustee, were used is subject to exclusion from eligibility for:

(1) the issuance of an initial license for a facility for which the person has not previously held a license; and

(2) the renewal of the license of the facility for which the trustee was appointed.

(h) DADS may deny an application for an initial license or refuse to renew a license if an applicant, license holder, controlling person, or any person required to submit background and qualification information:

(1) violates Texas Health and Safety Code, Chapter 247; a section, standard or order adopted under Chapter 247; or a license issued under Chapter 247 in either a repeated or substantial manner;

(2) commits an act described in §92.551(a)(2) - (7) of this chapter (relating to Administrative Penalties);

- (3) aids, abets, or permits a substantial violation described in paragraphs (1) - (2) [(2) - (3)] of this subsection about which the person had or should have had knowledge;
- (4) fails to provide the required information, facts, or references;
- (5) provides the following false or fraudulent information:
- (A) knowingly submits false or intentionally misleading statements to DADS;
- (B) uses subterfuge or other evasive means of filing an application for licensure;
- (C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;
- (D) knowingly conceals a material fact related to licensure; or
- (E) is responsible for fraud;
- (6) fails to pay the following fees, taxes, and assessments when due:
- (A) license fees as described in §92.4 of this chapter (relating to License Fees); or
- (B) franchise taxes, if applicable;
- (7) during the five years preceding the date of the application, has a history in any state or other jurisdiction of any of the following:
- (A) operation of a facility that has been decertified or has had its contract canceled under the Medicare or Medicaid program;
- (B) federal or state long-term care facility, assisted living facility, or similar facility sanctions or penalties, including monetary penalties, involuntary downgrading of the status of a facility license, proposals to decertify, directed plans of correction, or the denial of payment for new Medicaid admissions;
- (C) unsatisfied final judgments, excluding judgments wholly unrelated to the provision of care rendered in long-term care facilities;
- (D) eviction involving any property or space used as a facility; or
- (E) suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility;
- (8) violates Texas Health and Safety Code, §247.021 by operating a facility without a license; or
- (9) has been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure) during the time frames described in that chapter [has a state or federal criminal conviction for any offense that provides a penalty of incarceration].
- (i) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsection (h)(8) of this section, DADS considers exculpatory information provided by an applicant, a license holder, a person with a disclosable interest, or a manager and may grant a license if DADS finds the applicant, license holder, person with a disclosable interest, affiliate, or manager able to comply with the rules in this chapter.
- (j) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsections (f) and (h)(8) of this section, DADS considers only final actions. An

action is final when routine administrative and judicial remedies are exhausted. An applicant must disclose all actions, whether pending or final.

(k) If an applicant owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities. An overall record poor enough to deny issuance of a new license does not preclude the renewal of a license of a facility with a satisfactory record.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734



CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §97.2, concerning definitions, §97.11, concerning criteria and eligibility for licensing, §97.21, concerning denial of an application for a license, §97.241, concerning management, §97.244, concerning administrator qualifications and conditions and supervising nurse qualifications; and the repeal of §97.223, concerning offenses barring agency licensure, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies (HCSSAs), elsewhere in this issue of the *Texas Register*. As part of the proposal for the Chapter 99 rules, DADS proposes to amend the licensing rules for HCSSAs to reference new Chapter 99 and to repeal a section in the HCSSA rules governing criminal offenses that may constitute a bar to licensure, because those offenses are listed in Chapter 99.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.2 adds a definition for "chief financial officer" and "person with a disclosable interest" as used in the proposed amendment to §97.11. The section is also renumbered.

The proposed amendment to §97.11 updates the section to include a list of persons whose background DADS considers before issuing an initial or renewal license to operate a HCSSA or participate in management of a HCSSA. The amendment also adds a cross reference to new Chapter 99.

The proposed amendment to §97.21 updates cross references to other sections within the chapter.

The proposed repeal of §97.223 deletes the list of misdemeanor and felony convictions that may bar licensure of a HCSSA or participation in agency management. Chapter 99 rules, proposed in this issue of the *Texas Register*, governing criminal convictions barring facility licensure apply to all facility types, including HCSSAs.

The proposed amendment to §97.241 adds a cross reference to §97.11 and to new Chapter 99, which replace deleted rule language.

The proposed amendment to §97.244 adds a cross reference to proposed new Chapter 99.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and repeal are in effect, enforcing or administering the amendments and repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and repeal will not have an adverse economic effect on small businesses or micro-businesses, because they will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require HCSSAs to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and repeal are in effect, the public benefit expected as a result of enforcing the amendments and repeal is DADS will have clearer rules that are consistent across licensure types.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments and repeal. The amendments and repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on

the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Accessible and flexible services--Services which are delivered in the least intrusive manner possible and are provided in all settings where individuals live, work, and recreate.

(2) Administration of medication--The direct application of any medication by injection, inhalation, ingestion, or any other means to the body of a client. The preparation of medication is part of the administration of medication and is the act or process of making ready a medication for administration, including the calculation of a client's medication dosage; altering the form of the medication by crushing, dissolving, or any other method; reconstitution of an injectable medication; drawing an injectable medication into a syringe; preparing an intravenous admixture; or any other act required to render the medication ready for administration.

(3) Administrative support site--A facility or site where an agency performs administrative and other support functions but does not provide direct home health, hospice, or personal assistance services. This site does not require an agency license.

(4) Administrator--The person who is responsible for the day-to-day operations of an agency.

(5) Advanced practice nurse--A registered nurse who is approved by the Texas Board of Nursing to practice as an advanced practice nurse and who maintains compliance with the applicable rules of the Texas Board of Nursing. See the Texas Board of Nursing's definition of advanced practice nurse in 22 TAC §221.1 (concerning definitions).

(6) Advisory committee--A committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup, established for the purpose of obtaining advice or recommendations on issues or policies that are within the scope of a person's responsibility.

(7) Affiliate--With respect to an applicant or license holder, which is:

(A) a corporation--means each officer, director, and stockholder with direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--means each officer, member, and parent company;

(C) an individual--means:

- (i) the individual's spouse;
- (ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and
- (iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership or disclosable interest of at least 5.0%.

(D) a partnership--means each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--means each officer, director, or the equivalent under the specific business arrangement and each parent company.

(8) Agency--A home and community support services agency.

(9) Alternate delivery site--A facility or site, including a residential unit or an inpatient unit:

- (A) that is owned or operated by an agency providing hospice services;
- (B) that is not the hospice's principal place of business. For the purposes of this definition, the hospice's principal place of business is the parent office for the hospice;
- (C) that is located in the geographical area served by the hospice; and
- (D) from which the hospice provides hospice services.

(10) Applicant--The owner of an agency that is applying for a license under the statute. This is the person in whose name the license will be issued.

(11) Assistance with self-administration of medication--Any needed ancillary aid provided to a client in the client's self-administered medication or treatment regimen, such as reminding a client to take a medication at the prescribed time, opening and closing a medication container, pouring a predetermined quantity of liquid to be ingested, returning a medication to the proper storage area, and assisting in reordering medications from a pharmacy. Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation.

(12) Association--A partnership, limited liability company, or other business entity that is not a corporation.

(13) Audiologist--A person who is currently licensed under the Occupations Code, Chapter 401, as an audiologist.

(14) Bereavement--The process by which a survivor of a deceased person mourns and experiences grief.

(15) Bereavement services--Support services offered to a family during bereavement. Family includes a significant other(s).

(16) Branch office--A facility or site in the service area of a parent agency from which home health or personal assistance services are delivered or where active client records are maintained. This does not include inactive records that are stored at an unlicensed site.

(17) Care plan--

(A) a written plan prepared by the appropriate health care professional for a client of the home and community support services agency; or

(B) for home dialysis designation, a written plan developed by the physician, registered nurse, dietitian, and qualified social worker to personalize the care for the client and enable long- and short-term goals to be met.

(18) Case conference--A conference among personnel furnishing services to the client to ensure that their efforts are coordinated effectively and support the objectives outlined in the plan of care or care plan.

(19) Certified agency--A home and community support services agency, or portion of the agency, that:

(A) provides a home health service; and

(B) is certified by an official of the Department of Health and Human Services as in compliance with conditions of participation in Social Security Act, Title XVIII (42 United States Code (USC) §1395 et seq.).

(20) Certified home health services--Home health services that are provided by a certified agency.

(21) CHAP--Community Health Accreditation Program, Inc. An independent, nonprofit accrediting body that publicly certifies that an organization has voluntarily met certain standards for home and community-based health care.

(22) Chief financial officer--an individual who is responsible for supervising and managing all financial activities for a home and community support services agency.

(23) ~~[(22)]~~ Client--An individual receiving home health, hospice, or personal assistance services from a licensed home and community support services agency. This term includes each member of the primary client's family if the member is receiving ongoing services. This term does not include the spouse, significant other, or other family member living with the client who receives a one-time service (e.g., vaccine) if the spouse, significant other, or other family member receives the service in connection with the care of a client.

(24) ~~[(23)]~~ Clinical note--A dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms; treatment and medication given; the client's reaction; other health services provided; and any changes in physical and emotional condition.

(25) ~~[(24)]~~ CMS--Centers for Medicare and Medicaid Services. The federal agency that administers the Medicare program and works in partnership with the states to administer Medicaid.

(26) ~~[(25)]~~ Complaint--An allegation against an agency regulated by DADS or against an employee of an agency regulated by DADS that involves a violation of this chapter or the statute.

(27) ~~[(26)]~~ Community disaster resources--A local, statewide, or nationwide emergency system that provides information and resources during a disaster, including weather information, transportation, evacuation, and shelter information, disaster assistance and recovery efforts, evacuee and disaster victim resources, and resources for locating evacuated friends and relatives.

(28) ~~[(27)]~~ Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company or other business entity that operates or contracts with others for the operation of an agency;

(ii) a person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency; and

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(29) [(28)] Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(30) [(29)] Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(31) [(30)] DADS--Department of Aging and Disability Services.

(32) [(31)] Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(33) [(32)] Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(34) [(33)] Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(35) [(34)] Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(36) [(35)] Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

(37) [(36)] Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, such as fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, epidemic, air contamination, infestation, explosion, riot, hostile military or paramilitary action, or energy emergency. In a freestanding hospice, a disaster also includes failure of the heating or cooling system, power outage, explosion, and bomb threat.

(38) [(37)] End stage renal disease (ESRD)--For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(39) [(38)] Freestanding hospice--An agency that provides hospice services to clients of the agency who are residing at the agency's physical location including inpatient and respite care.

(40) [(39)] Functional need--Needs of the individual that require services without regard to diagnosis or label.

(41) [(40)] Health assessment--A determination of a client's physical and mental status through inventory of systems.

(42) [(41)] Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(43) [(42)] Home health aide--An individual working for an agency who meets at least one of the requirements for home health aides as defined in §97.701 of this chapter (relating to Home Health Aides).

(44) [(43)] Home health medication aide--A person permitted under the Health and Safety Code, Chapter 142, Subchapter B.

(45) [(44)] Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(46) [(45)] Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(47) [(46)] Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(48) [(47)] Independent living environment--A client's residence, which may include a group home or foster home, or other settings where a client participates in activities, including school, work, or church.

(49) [(48)] Individual/family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(50) [(49)] Individualized service plan--A written plan prepared by the appropriate health care personnel for a client of a home and community support services agency licensed to provide personal assistance services.

(51) [(50)] Inpatient unit--A facility that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with:

(A) the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.); and

(B) standards adopted under this chapter.

(52) [(51)] IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.

(53) [(52)] JCAHO--Joint Commission on Accreditation of Healthcare Organizations. An independent, nonprofit organization for standard-setting and accrediting in-home care and other areas of health care.

(54) [(53)] Licensed vocational nurse--A person who is currently licensed under Occupations Code, Chapter 301, as a licensed vocational nurse.

(55) [(54)] Life Safety Code (also referred to as NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(56) [(55)] Manager--An employee or independent contractor responsible for providing management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(57) [(56)] Medication administration record--A record used to document the administration of a client's medications.

(58) [(57)] Medication list--A list that includes all prescription and over-the-counter medication that a client is currently taking, including the dosage, the frequency, and the method of administration.

(59) [(58)] Mitigation--An action taken to eliminate or reduce the probability of a disaster, or reduce a disaster's severity or consequences.

(60) [(59)] Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(61) [(60)] Nursing facility--An institution licensed as a nursing home under the Health and Safety Code, Chapter 242.

(62) [(61)] Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help the client understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(63) [(62)] Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Occupations Code, Chapter 454, as an occupational therapist.

(64) [(63)] Original active client record--A record composed first-hand for a client currently receiving services.

(65) [(64)] Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness.

(66) [(65)] Parent agency--An agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(67) [(66)] Parent company--A person, other than an individual, who has a direct 100% ownership interest in the owner of an agency.

(68) [(67)] Person--An individual, corporation, or association.

(69) Person with a disclosable interest--Any person who owns at least a 5.0% interest in any corporation, partnership, or other business entity that is required to be licensed under Health and Safety Code, Chapter 142. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the agency.

(70) [(68)] Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Texas Board of Nursing through a memorandum of understanding with DADS in accordance with Health and Safety Code, §142.016; and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(71) [(69)] Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

- (A) bathing;
- (B) dressing;
- (C) grooming;
- (D) feeding;
- (E) exercising;
- (F) toileting;
- (G) positioning;
- (H) assisting with self-administered medications;
- (I) routine hair and skin care; and
- (J) transfer or ambulation.

(72) [(70)] Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(73) [(71)] Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(74) [(72)] Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(75) [(73)] Physician-delegated task--A task performed in accordance with the Occupations Code, Chapter 157, including orders signed by a physician that specify the delegated task, the individual to whom the task is delegated, and the client's name.

(76) [(74)] Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. This term includes a parent agency, a branch office, and an alternate delivery site. The term does not include an administrative support site.

(77) [(75)] Plan of care--The written orders of a practitioner for a client who requires skilled services.

(78) [(76)] Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Texas Board of Nursing as an advanced practice nurse.

(79) [(77)] Preparedness--Actions taken in anticipation of a disaster.

(80) [(78)] Presurvey conference--A conference held with DADS staff and the applicant or the applicant's representatives to review licensure standards and survey documents, and to provide consultation before the survey.

(81) [(79)] Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(82) [(80)] Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

- (A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;
- (B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(83) [(81)] Recovery--Activities implemented during and after a disaster response designed to return an agency to its normal operations as quickly as possible.

(84) [(82)] Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(85) [(83)] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC[] Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC[] Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(86) [(84)] Residence--A place where a person resides, including a home, a nursing facility, a convalescent home, or a residential unit.

(87) [(85)] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(88) [(86)] Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(89) [(87)] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(90) [(88)] Response--Actions taken immediately before an impending disaster or during and after a disaster to address the immediate and short-term effects of the disaster.

(91) [(89)] Section--A reference to a specific rule in this chapter.

(92) [(90)] Service area--A geographic area established by an agency in which all or some of the agency's services are available.

(93) [(91)] Skilled services--Services in accordance with a plan of care that require the skills of:

- (A) a registered nurse;
- (B) a licensed vocational nurse;
- (C) a physical therapist;
- (D) an occupational therapist;
- (E) a respiratory therapist;
- (F) a speech-language pathologist;
- (G) an audiologist;
- (H) a social worker; or
- (I) a dietitian.

(94) [(92)] Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(95) [(93)] Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(96) [(94)] Statute--The Health and Safety Code, Chapter 142.

(97) [(95)] Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(98) [(96)] Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(c) of this chapter (relating to Administrator Qualifications and Conditions and Supervising Nurse Qualifications). This person may also be known as the director of nursing or similar title.

(99) [(97)] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(100) [(98)] Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(101) [(99)] Survey--An on-site inspection or complaint investigation conducted by a DADS representative to determine if an agency is in compliance with the statute and this chapter or in compliance with applicable federal requirements or both.

(102) [(100)] Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(103) [(101)] Unlicensed person--An individual who is not licensed as a health care professional. The term includes home health aides, medication aides permitted by DADS, and other individuals providing personal care or assistance in health services.

(104) [(102)] Unsatisfied judgments--A failure to fully carry out the terms or meet the obligation of a court's final disposition on the matters before it in a suit regarding the operation of an agency.

(105) [(103)] Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(106) [(104)] Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(107) [(105)] Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734



SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §97.11, §97.21

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.11. Criteria and Eligibility for Licensing.

(a) An applicant for a license must not admit a client or initiate services until the applicant completes ~~has completed~~ the application process and receives ~~has received~~ an initial license.

(b) A first-time application for a license is an application for an initial license.

(c) An application for a license when there is a change of ownership is an application for an initial license.

(d) A separate license is required for each place of business as defined in §97.2 of this chapter (relating to Definitions).

(e) An agency's place of business must be located in and have an address in Texas. An agency located in another state must receive a license as a parent agency in Texas to operate as an agency in Texas.

(f) An applicant must be at least 18 years of age.

(g) Before issuing a license, DADS considers the background and qualifications of:

- (1) the applicant;
- (2) a controlling person of the applicant;
- (3) a person with a disclosable interest;
- (4) an affiliate of the applicant;
- (5) the administrator;
- (6) the alternate administrator; and
- (7) the chief financial officer.

(h) ~~[(g)]~~ DADS may deny an application for an initial license or for renewal of a license ~~[the issuance of a license to an applicant]~~ if any person described in subsection (g) of this section ~~[the applicant, a controlling person of the applicant, a person with a disclosable interest, an affiliate of the applicant, an administrator, or an alternate administrator]~~:

- (1) on the date of the ~~[at the time of]~~ application:

(A) has been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility License) during the time frames described in that chapter;~~[:]~~

~~{(i) a crime listed in Health and Safety Code, §250.006 (relating to Convictions Barring Employment) within the time frames described in that section; or}~~

~~{(ii) a crime listed in §97.223 of this chapter (relating to Offenses Barring Agency Licensure) within the time frames described in that section;}~~

(B) has an unsatisfied final judgment in any state or other jurisdiction;

(C) is in default on a guaranteed student loan (Education Code, §57.491); or

(D) is delinquent on child support obligations (Family Code, Chapter 232);

(2) for two years preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) an unresolved federal or state tax lien;

(B) an eviction involving any property or space used as an inpatient hospice agency; or

(C) an unresolved final Medicare or Medicaid audit exception; or

(3) for twelve months preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) denial, suspension, or revocation of an agency license or a license for a health care facility;

(B) surrendering a license before expiration or allowing a license to expire instead of the licensing authority proceeding with enforcement action;

(C) a Medicaid or Medicare sanction or penalty relating to the operation of an agency or a health care facility;

(D) operating an agency that has been decertified in any state under Medicare or Medicaid; or

(E) debarment, exclusion, or involuntary contract cancellation in any state from Medicare or Medicaid.

§97.21. Denial of an Application or a License.

(a) DADS may deny an application for an initial license or for renewal of a license if any person described in §97.11(g) of this subchapter (relating to Criteria and Eligibility for Licensing) [an applicant, an affiliate of the applicant, a manager of the applicant, or a person required to submit background and qualification information]:

(1) fails to comply with the statute;

(2) fails to comply with this chapter;

(3) knowingly aids, abets, or permits another person to violate the statute or this chapter; or

(4) fails to meet the criteria for a license established in §97.11 of this subchapter [chapter (relating to Criteria and Eligibility for Licensing)].

(b) If DADS denies an application for an initial license or for renewal of a license, the applicant or agency may request an [a formal] administrative hearing. An [A formal] administrative hearing is held under the Health and Human Services Commission's rules in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) [through a formal hearing process as described in §97.601 of this chapter (relating to Enforcement Actions)].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 2. CONDITIONS OF A LICENSE

40 TAC §97.223

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

The repeal affects Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.223. Offenses Barring Agency Licensure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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DIVISION 3. AGENCY ADMINISTRATION

40 TAC §97.241, §97.244

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001 - 142.030.

§97.241. Management.

(a) Agency policies. The license holder is responsible for the conduct of the agency and for the adoption, implementation, enforcement, and monitoring of adherence to the written policies required throughout this chapter. The license holder is also responsible for ensuring that the policies comply with the statute and the applicable provisions of this chapter and are administered to provide safe, professional, quality health care.

(b) Criminal conviction. The persons described in §97.11(g) of this chapter (relating to Criteria and Eligibility for Licensing) must not have been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure), during the time frames described in that chapter. ~~[license holder, the controlling person, the affiliate, the administrator, or the alternate administrator must not have been convicted of:]~~

~~{(1) a crime listed in Health and Safety Code, §250.006 (relating to Convictions Barring Employment) during the time frames described in that section; or}~~

~~{(2) a crime listed in §97.223 of this chapter (relating to Offenses Barring Agency Licensure) during the time frames described in that section.}~~

(c) Documentation. The license holder must ensure that all documents submitted to DADS or maintained by the agency pursuant to this chapter are accurate and do not misrepresent or conceal a material fact.

(d) Compliance with enforcement orders. The license holder must comply with an order of the DADS commissioner or other enforcement orders that may be imposed on the agency in accordance with the statute and this chapter.

§97.244. Administrator Qualifications and Conditions and Supervising Nurse Qualifications.

(a) Administrator qualifications.

(1) For an agency licensed to provide licensed home health services, licensed and certified home health services, or hospice services, the administrator and the alternate administrator must:

(A) be a licensed physician, registered nurse, licensed social worker, licensed therapist, or licensed nursing home administrator with at least one year of management or supervisory experience in a health-related setting, such as:

- (i) a home and community support services agency;
- (ii) a hospital;
- (iii) a nursing facility;

(iv) a hospice;

(v) an outpatient rehabilitation center;

(vi) a psychiatric facility;

(vii) an intermediate care facility for persons with mental retardation or related conditions; or

(viii) a licensed health care delivery setting providing services for individuals with functional disabilities; or

(B) have a high school diploma or a general equivalency degree (GED) with at least two years of management or supervisory experience in a health-related setting, such as:

(i) a home and community support services agency;

(ii) a hospital;

(iii) a nursing facility;

(iv) a hospice;

(v) an outpatient rehabilitation center;

(vi) a psychiatric facility;

(vii) an intermediate care facility for persons with mental retardation or related conditions; or

(viii) a licensed health care delivery setting providing services for individuals with functional disabilities.

(2) For an agency licensed to provide only personal assistance services, the administrator and the alternate administrator must meet at least one of the following qualifications:

(A) have a high school diploma or a GED with at least one year experience or training in caring for individuals with functional disabilities;

(B) have completed two years of full-time study at an accredited college or university in a health-related field; or

(C) meet the qualifications listed in paragraph (1)(A) or (B) of this subsection.

(b) Administrator conditions.

(1) An administrator and alternate administrator must be able to read, write, and comprehend English.

(2) An administrator and alternate administrator designated as an administrator or alternate administrator for the first time on or after December 1, 2006, must meet the initial educational training requirements specified in §97.259 of this chapter (relating to Initial Educational Training in Administration of Agencies).

(3) An administrator and alternate administrator designated as an administrator or alternate administrator before December 1, 2006, must meet the continuing education requirements specified in §97.260 of this chapter (relating to Continuing Education in Administration of Agencies).

(4) A person is not eligible to be the administrator or alternate administrator of any agency if the person was the administrator of an agency cited with a violation that resulted in DADS taking enforcement action against the agency while the person was the administrator of the cited agency.

(A) This paragraph applies for 12 months after the date of the enforcement action.

(B) For purposes of this paragraph, enforcement action means license revocation, suspension, emergency suspension of a license, denial of an application for a license, or the imposition of an injunction but does not include administrative or civil penalties.

(C) If DADS prevails in one enforcement action against the agency and also proceeds with, but does not prevail in, another enforcement action based on some or all of the same violations, this paragraph does not apply.

(5) An administrator and alternate administrator must not be convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure) during the time frames described in that chapter [a crime, offense, or misdemeanor as defined in §97.241(b) of this chapter (relating to Management)].

(c) Supervising nurse qualifications.

(1) For an agency without a home dialysis designation, a supervising nurse and alternate supervising nurse must each:

(A) be a registered nurse (RN) licensed in Texas or in accordance with the Texas Board of Nursing rules for Nurse Licensure Compact (NLC); and

(B) have at least one year experience as an RN within the last 36 months.

(2) For an agency with home dialysis designation, a supervising nurse and alternate supervising nurse must each:

(A) be an RN licensed in Texas or in accordance with the Texas Board of Nursing rules for NLC, and:

(i) have at least three years current experience in hemodialysis; or

(ii) have at least two years experience as an RN and hold a current certification from a nationally recognized board in nephrology nursing or hemodialysis; or

(B) be a nephrologist or physician with training or demonstrated experience in the care of ESRD clients.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.11, §98.19

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §98.11, concerning criteria

for licensing, and §98.19, concerning criteria for denying a license or renewal of a license, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies, elsewhere in this issue of the *Texas Register*. As part of the proposal for the Chapter 99 rules, DADS proposes to amend the licensing rules for adult day care facilities to reference new Chapter 99.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.11 adds language regarding whose background and qualifications DADS considers before issuing a license to operate an adult day care facility.

The proposed amendment to §98.19 adds a cross reference to new Chapter 99. The amendment also updates rule cross references and adds language to clarify and improve the section.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require adult day care facilities to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is DADS will have clearer rules that are consistent across licensure types.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescom-

ments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides DADS with the authority to license and regulate adult day care facilities.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Human Resources Code, §§103.001 - 103.011.

§98.11. *Criteria for Licensing.*

(a) A person must be licensed to establish or operate an adult day care facility in Texas.

(b) An applicant for a license must submit a complete application form and license fee to DADS.

(c) An applicant for a license must affirmatively show that [the following]:

[~~(1)~~ the applicant, person with a disclosable interest, affiliate, and manager do not have state or federal criminal convictions for any offense that provides a penalty of incarceration;]

(1) [~~(2)~~] the facility meets the standards of the Life Safety Code, NFPA 101, 2000 edition;

(2) [~~(3)~~] the facility meets the construction standards in Subchapter C of this chapter (relating to Facility Construction Procedures); and

(3) [~~(4)~~] the facility meets the requirements for operation based on an on-site survey.

(d) DADS may deny an application that remains incomplete after 120 days.

(e) Before issuing a license, DADS considers the background and qualifications of:

(1) the applicant or license holder;

(2) a person with a disclosable interest;

(3) an affiliate of the applicant or license holder;

(4) a director; and

(5) a manager.

(f) [~~(e)~~] DADS issues a license if it finds that the facility, and any person described in subsection (e) of this section meet [A license will be issued to a facility meeting] all requirements of this chapter.

The license is [~~and will be~~] valid for two years, except as provided by §98.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications). The maximum allowable number of clients specified on the license must [~~may~~] not be exceeded.

(g) [~~(f)~~] The license must be posted in the area where clients are admitted and be viewable by clients [~~accessible to them~~] and their legal guardians.

§98.19. *Criteria for Denying a License or Renewal of a License.*

(a) DADS may deny an initial license or refuse to renew a license if any person described in §98.11(e) of this subchapter (relating to Criteria for Licensing) [~~an applicant, manager, or affiliate~~]:

(1) has been convicted of an offense described in Chapter 99 of this title (relating to Criminal Convictions Barring Facility Licensure) during the time frames described in that chapter;

(2) [~~(1)~~] substantially fails to comply with the requirements described in §§98.42, 98.43, 98.61, and 98.62 of this title (relating to Safety; Sanitation; General Requirements; and Program Requirements), including:

(A) noncompliance that poses a serious threat to health and safety; or

(B) a failure to maintain compliance on a continuous basis;

(3) [~~(2)~~] aids, abets, or permits a substantial violation described in paragraph (2) [~~(1)~~] of this subsection about which the person [~~applicant, manager, or affiliate~~] had or should have had knowledge;

(4) [~~(3)~~] fails to provide the required information, facts, or [~~and/or~~] references;

(5) [~~(4)~~] knowingly provides the following false or fraudulent information:

(A) submits false or intentionally misleading statements to DADS;

(B) uses subterfuge or other evasive means of filing;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact; or

(E) is responsible for fraud;

(6) [~~(5)~~] fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §98.21 of this title (relating to License Fees); and

(B) franchise taxes, if applicable;

(7) [~~(6)~~] has a history of [~~discloses~~] any of the following actions during [~~within~~] the two-year period preceding the date of the application:

(A) operation of a facility that has been decertified or [~~and/or~~] had its contract canceled under the Medicare or Medicaid program in any state;

(B) federal or state Medicare or Medicaid sanctions or penalties;

[~~(C)~~ state or federal criminal convictions for any offense that provides a penalty of incarceration;]

(C) [~~(D)~~] unsatisfied final judgments;

(D) ~~[(E)]~~ eviction involving any property or space used as a facility in any state;

(E) ~~[(F)]~~ suspension of a license to operate a health facility, long-term care facility, assisted living facility, or a similar facility in any state.

(b) Concerning subsection (a)(7) ~~[(a)(6)]~~ of this section, DADS may consider exculpatory information provided by any person described in §98.11(e) of this subchapter ~~[the applicant, manager, or affiliate to]~~ and grant a license ~~[under subsection (a)(6) of this section]~~ if DADS finds that person ~~[the applicant, manager, or affiliate]~~ able to comply with the rules in this chapter.

(c) DADS does ~~[will]~~ not issue a license to an applicant to operate a new facility if the applicant has a history of ~~[discloses]~~ any of the following actions during the two-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting any person described in §98.11(e) of this subchapter ~~[the applicant, manager, or affiliate]~~ from operating a facility.

(d) Only final actions are considered for purposes of subsections (a)(7) ~~[(a)(6)]~~ and (c) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(e) If an applicant owns multiple facilities, the overall record of compliance in all of the facilities will be examined. An overall record poor enough to deny issuance of a new license will not preclude the renewal of licenses of individual facilities with satisfactory records.

(f) If DADS denies a license or refuses to issue a renewal of a license, the applicant or license holder ~~[licensee]~~ may request a hearing ~~[formal appeal]~~ by following the Health and Human Services Commission's rules ~~[formal hearing procedures]~~ in 1 TAC^[-] Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act). An ~~[A formal]~~ administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and ~~[the formal hearing procedures in]~~ 1 TAC^[-] Chapter 357, Subchapter I.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901358

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734



CHAPTER 99. CRIMINAL CONVICTIONS BARRING FACILITY LICENSURE

40 TAC §99.1, §99.2

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §99.1, concerning definitions, and new §99.2, concerning convictions barring licensure, in new Chapter 99, Criminal Convictions Barring Facility Licensure.

BACKGROUND AND PURPOSE

HHSC, on behalf of DADS, is proposing new rules in Chapter 99 that govern criminal convictions barring licensure for nursing facilities, assisted living facilities, adult day care facilities, intermediate care facilities for persons with mental retardation and home and community support services agencies. As part of the proposal for the Chapter 99 rules, DADS proposes to amend the licensing rules for all other facility types to reference new Chapter 99. The proposed amendments to the licensing rules are published elsewhere in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

Proposed new §99.1 defines what "facility" means in Chapter 99.

Proposed new §99.2 lists the criminal convictions that DADS may consider when making a licensure decision to issue, renew, or revoke a license. The new section also includes criteria that DADS uses in deciding whether to issue, renew, or revoke a license when an applicant, license holder, or any other person whose criminal history must be verified, has been convicted of one of the listed offenses.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed new sections will not have an adverse economic effect on small businesses or micro-businesses, because the amendments will not change current requirements for record keeping or reporting, application procedures, or other internal procedures. The amendments do not require any entities to hire additional employees or to pay new fees.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the new sections are in effect, the public benefit expected as a result of enforcing the new sections is that DADS will have rules stating which criminal offenses may result in a decision to deny an application for an initial license or a renewal license or to revoke a license.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the new sections. The new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-007, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 007" in the subject line.

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities; Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate ICFs/MR; Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities; Texas Human Resources Code, Chapter 103, which authorize DADS to license and regulate adult day care facilities; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

The new sections implement Texas Government Code, §531.0055, Texas Human Resources Code, §§103.001 - 103.011 and 161.021, Texas Health and Safety Code, §§142.001 - 142.030, §§242.001 - 242.906, §§247.001 - 247.068, and §§252.001 - 252.181.

§99.1. Definitions.

In this chapter, facility means:

- (1) a nursing home licensed under Chapter 242 of the Texas Health and Safety Code;
- (2) an assisted living facility licensed under Chapter 247 of the Texas Health and Safety Code;
- (3) a home and community support services agency licensed under Chapter 142 of the Texas Health and Safety Code;
- (4) an adult day care facility licensed under Chapter 103 of the Texas Human Resources Code; or
- (5) an intermediate care facility for persons with mental retardation licensed under Chapter 252 of the Texas Health and Safety Code.

§99.2. Convictions Barring Licensure.

(a) The Department of Aging and Disability Services (DADS) may deny an initial facility license, or refuse to renew a facility license,

if an applicant for a license, a license holder, or any other person whose criminal history must be verified before a license is issued:

(1) has been convicted, regardless of the date of conviction, of any of the following misdemeanor or felony offenses:

(A) an offense listed in Texas Health and Safety Code, §250.006(a) or (c) (relating to Convictions Barring Employment);

(B) an offense relating to the practice of a health-related profession without a license;

(C) an offense relating to drugs, dangerous drugs, or controlled substances; or

(D) an offense under any of the following sections of the Texas Penal Code:

(i) Section 22.015, Coercing, soliciting, or inducing gang membership;

(ii) Section 22.09, Tampering with consumer product;

(iii) Section 22.10, Leaving a child in a vehicle;

(iv) Section 32.42, Deceptive business practices;

(v) Section 32.51, Fraudulent use or possession of identifying information;

(vi) Section 35.02, Insurance fraud;

(vii) Section 42.072, Stalking;

(viii) Section 42.10, Dog fighting;

(ix) Section 43.05, Compelling prostitution;

(x) Section 43.24, Sale, distribution, or display of harmful material to minor;

(xi) Section 43.25, Sexual performance by a child;

(xii) Section 43.251, Employment harmful to children;

(xiii) Section 43.26, Possession or promotion of child pornography;

(xiv) Section 46.06, Unlawful transfer of certain weapons;

(xv) Section 46.13, Making a firearm accessible to a child;

(xvi) Section 48.02, Prohibition of the purchase and sale of human organs;

(xvii) Section 49.07, Intoxication assault; or

(xviii) Section 49.08, Intoxication manslaughter; or

(2) has been convicted, during the five years preceding the date of the facility license application, of any of the following misdemeanor or felony offenses:

(A) an offense listed in Texas Health and Safety Code, §250.006(b); or

(B) an offense under any of the following sections of the Texas Penal Code:

(i) Section 30.03, Burglary of coin-operated or coin collection machines;

(ii) Section 30.04, Burglary of vehicles;

(iii) Section 31.03, Theft;

- (iv) Section 31.04, Theft of service;
- (v) Section 32.21, Forgery;
- (vi) Section 32.31, Credit card or debit card abuse;
- (vii) Section 32.33, Hindering secured creditors;
- (viii) Section 32.48, Simulating legal process;
- (ix) Section 33.02, Breach of computer security;
- (x) Section 42.061, Silent or abusive calls to 9-1-1

service;

- (xi) Section 42.07, Harassment; or
- (xii) Section 42.091, Attack on assistance animal.

(b) DADS may revoke a facility license if DADS becomes aware of:

(1) a conviction described in subsection (a)(1) of this section regardless of the date of the conviction; or

(2) a conviction described in subsection (a)(2) of this section if the conviction occurred during the five years preceding the date DADS became aware of the conviction.

(c) DADS considers a conviction of an offense under the laws of another state, federal law, or the Uniform Code of Military Justice containing elements that are substantially similar to the elements of an offense listed in subsection (a) of this section as if it is a conviction of one of the listed offenses.

(d) DADS considers the following information when deciding if it will deny a facility license, refuse to renew a facility license, or revoke a facility license in accordance with this section:

- (1) the nature and seriousness of the offense;

(2) the relationship of the offense to the operation of a facility;

(3) the extent to which a license might offer an opportunity for the person to engage in activity similar to the offense;

(4) the age of the person at the time of the offense;

(5) the amount of time since the offense; and

(6) any other information provided by the person to explain the circumstances of the offense or to evidence the person's conduct since the offense.

(e) For purposes of this section, a person who is placed on deferred adjudication community supervision for an offense listed in this section, successfully completes the period of deferred adjudication community supervision, and receives a dismissal and discharge in accordance with Section 5(c), Article 42.12, Code of Criminal Procedure, is not considered convicted of the offense for which the person received deferred adjudication community supervision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901359

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 17, 2009

For further information, please call: (512) 438-3734

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBATION COMMISSION

CHAPTER 343. SECURE JUVENILE PRE-ADJUDICATION DETENTION AND POST-ADJUDICATION CORRECTIONAL FACILITIES

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§343.100, 343.102, 343.104, 343.106

The Texas Juvenile Probation Commission withdraws the proposed new §§343.100, 343.102, 343.104, and 343.106 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 527).

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TRD-200901311

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Effective date: April 6, 2009

For further information, please call: (512) 424-6682



SUBCHAPTER B. PRE-ADJUDICATION AND POST-ADJUDICATION SECURE FACILITY STANDARDS

37 TAC §§343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248 - 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, 343.386

The Texas Juvenile Probation Commission withdraws the proposed new §§343.200, 343.202, 343.204, 343.206, 343.208, 343.210, 343.212, 343.214, 343.218, 343.220, 343.222, 343.224, 343.226, 343.228, 343.230, 343.232, 343.234, 343.236, 343.238, 343.240, 343.242, 343.244, 343.246, 343.248 - 343.250, 343.260, 343.262, 343.264, 343.266, 343.268, 343.270, 343.272, 343.274, 343.276, 343.278, 343.280, 343.282, 343.286, 343.288, 343.290, 343.300, 343.302, 343.304, 343.306, 343.308, 343.310, 343.312, 343.314, 343.316, 343.320, 343.322, 343.324, 343.326, 343.328, 343.330, 343.332, 343.334, 343.336, 343.338, 343.340, 343.342, 343.346, 343.348, 343.350, 343.352, 343.354, 343.356, 343.358, 343.360, 343.362, 343.364, 343.366, 343.368, 343.370, 343.372, 343.374, 343.376, 343.378, 343.380, 343.382, 343.384, and 343.386 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 531).

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TRD-200901312

Lisa A. Capers

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Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER C. SECURE PRE-ADJUDICATION DETENTION FACILITY STANDARDS

37 TAC §§343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414, 343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448, 343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, 343.498

The Texas Juvenile Probation Commission withdraws the proposed new §§343.400, 343.402, 343.404, 343.406, 343.408, 343.410, 343.412, 343.414, 343.416, 343.418, 343.420, 343.422, 343.424, 343.426, 343.428, 343.430, 343.432, 343.434, 343.436, 343.438, 343.440, 343.442, 343.444, 343.446, 343.448, 343.450, 343.452, 343.454, 343.456, 343.458, 343.460, 343.462, 343.464, 343.468, 343.470, 343.472, 343.474, 343.476, 343.478, 343.480, 343.482, 343.484, 343.486, 343.488 - 343.494, 343.496, and 343.498 which appeared in the January 6, 2009, issue of the *Texas Register* (34 TexReg 542).

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Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER D. SECURE POST-ADJUDICATION CORRECTIONAL FACILITY STANDARDS

37 TAC §§343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, 343.712

The Texas Juvenile Probation Commission withdraws the proposed new §§343.600, 343.602, 343.604, 343.606, 343.608, 343.610, 343.612, 343.614, 343.616, 343.618, 343.620, 343.622, 343.624, 343.626, 343.628, 343.630, 343.632, 343.634, 343.636, 343.638, 343.640, 343.642, 343.644, 343.646, 343.648, 343.650, 343.652, 343.654, 343.656, 343.658, 343.660, 343.662, 343.664, 343.666, 343.668, 343.670 - 343.678, 343.680, 343.686, 343.688, 343.690, 343.700, 343.702, 343.704, 343.706, 343.708, 343.710, and 343.712 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 547).

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TRD-200901314

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER E. RESTRAINTS

37 TAC §§343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816, 343.818

The Texas Juvenile Probation Commission withdraws the proposed new §§343.800, 343.802, 343.804, 343.806, 343.808, 343.810, 343.812, 343.816, and 343.818 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 553).

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TRD-200901315

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



CHAPTER 344. EMPLOYMENT, CERTIFICATION AND TRAINING SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

37 TAC §§344.100, 344.110, 344.120

The Texas Juvenile Probation Commission withdraws the proposed new §§344.100, 344.110, and 344.120 which appeared in the January 30, 2009 issue of the *Texas Register* (34 TexReg 557).

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TRD-200901362

Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER B. QUALIFICATIONS FOR EMPLOYMENT

37 TAC §§344.200, 344.210, 344.220, 344.230

The Texas Juvenile Probation Commission withdraws the proposed new §§344.200, 344.210, 344.220, and 344.230 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 558).

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Lisa A. Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

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For further information, please call: (512) 424-6682



SUBCHAPTER C. CRIMINAL HISTORY SEARCHES

37 TAC §§344.300, 344.310, 344.320, 344.330, 344.340

The Texas Juvenile Probation Commission withdraws proposed new §§344.300, 344.310, 344.320, 344.330, and 344.340 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 559).

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: April 6, 2009
For further information, please call: (512) 694-7894



SUBCHAPTER D. DISQUALIFYING CRIMINAL HISTORY

37 TAC §§344.400, §344.410

The Texas Juvenile Probation Commission withdraws the proposed new §344.400 and §344.410 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 560).

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TRD-200901323

Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: April 6, 2009
For further information, please call: (512) 424-6682



SUBCHAPTER E. EDUCATION REQUIREMENTS FOR EMPLOYMENT AND CERTIFICATION

37 TAC §§344.500, 344.510, 344.520

The Texas Juvenile Probation Commission withdraws the proposed new §§344.500, 344.510, and 344.520 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 561).

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TRD-200901324

Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6682



SUBCHAPTER F. TRAINING AND CONTINUING EDUCATION

37 TAC §§344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, 344.680

The Texas Juvenile Probation Commission withdraws the proposed new §§344.600, 344.610, 344.620, 344.630, 344.640, 344.650, 344.660, 344.670, and 344.680 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 561).

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TRD-200901325

Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6682



SUBCHAPTER G. COMPETENCY EXAMINATION

37 TAC §344.700

The Texas Juvenile Probation Commission withdraws the proposed new §344.700 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 563).

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TRD-200901326

Lisa A. Capers
Deputy Executive Director and General Counsel
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SUBCHAPTER H. CERTIFICATION

37 TAC §§344.800, 344.810, 344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880, 344.890

The Texas Juvenile Probation Commission withdraws the proposed new §§344.800, 344.810, 344.820, 344.830, 344.840, 344.850, 344.860, 344.870, 344.880 and 344.890 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 564).

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Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
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For further information, please call: (512) 424-6682



CHAPTER 350. INVESTIGATING ABUSE, NEGLECT, EXPLOITATION, DEATH AND SERIOUS INCIDENTS

37 TAC §§350.100, 350.110, 350.120, 350.200, 350.210, 350.220, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, 350.900 - 350.904

The Texas Juvenile Probation Commission withdraws the proposed new §§350.100, 350.110, 350.120, 350.200, 350.210, 350.220, 350.300, 350.400, 350.500, 350.600, 350.610, 350.620, 350.700, 350.800, and 350.900 - 350.904 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 566).

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TRD-200901336
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: April 6, 2009
For further information, please call: (512) 424-6682

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CHAPTER 358. IDENTIFYING, REPORTING
AND INVESTIGATING ABUSE, NEGLECT,
EXPLOITATION, DEATH AND SERIOUS
INCIDENTS

**37 TAC §§358.100, 358.120, 358.140, 358.200, 358.220,
358.300, 358.320, 358.400, 358.420, 358.440, 358.460,
358.480, 358.500, 358.600, 358.620, 358.640, 358.660,
358.680, 358.700, 358.720, 358.740, 358.760, 358.780,
358.800, 358.820, 358.840, 358.900, 358.920**

The Texas Juvenile Probation Commission withdraws the proposed new §§358.100, 358.120, 358.140, 358.200, 358.220, 358.300, 358.320, 358.400, 358.420, 358.440, 358.460, 358.480, 358.500, 358.600, 358.620, 358.640, 358.660, 358.680, 358.700, 358.720, 358.740, 358.760, 358.780, 358.800, 358.820, 358.840, 358.900, and 358.920 which appeared in the January 30, 2009, issue of the *Texas Register* (34 TexReg 569).

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TRD-200901338
Lisa A. Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: April 6, 2009
For further information, please call: (512) 424-6682

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 257. STATE OFFICE OF RURAL HEALTH

SUBCHAPTER D. TEXAS RURAL PHYSICIAN ASSISTANT LOAN REIMBURSEMENT PROGRAM

10 TAC §257.109

The Office of Rural Community Affairs (Office) adopts the amendment to §257.109 for the State Office of Rural Health area funds, without changes to the proposal published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8856).

The amendment to subsection (b) changes the name of the Office's "Executive Committee" to "Board". The amendment to subsection (c)(5) includes information in regards to the Executive Director's authority to waive provisions of rules, if necessary, and will address unusual or exceptional circumstances under this section.

No comments were received regarding the adoption of this amendment.

The amendment is being adopted under §487.052 of the Texas Government Code, which provides the Board with authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the adopted amendment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2009.

TRD-200901272

Charles S. (Charlie) Stone

Executive Director

Office of Rural Community Affairs

Effective date: April 20, 2009

Proposal publication date: October 31, 2008

For further information, please call: (512) 936-6726



TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 30. ADMINISTRATION

SUBCHAPTER A. STATE BOARD OF EDUCATION: GENERAL PROVISIONS

19 TAC §30.1

The State Board of Education (SBOE) adopts an amendment to §30.1, concerning petitioning for adoption of rule changes. The amendment is adopted without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 926) and will not be republished. The section establishes the SBOE process for petitioning the adoption of changes to SBOE rules, as required by Texas Government Code, §2001.021. The amendment adopts in rule the form to be used when an individual elects to petition adoption of SBOE rule changes in the Texas Administrative Code.

Texas Government Code, §2001.021, requires that procedures to petition for the adoption of rule changes be adopted by rule. To comply with statute, the SBOE adopted 19 TAC Chapter 30, Administration, Subchapter A, State Board of Education: General Provisions, §30.1, Petition for Adoption of Rule Changes, effective December 5, 2004. Prior to the adoption of 19 TAC §30.1, procedures to petition for the adoption of changes to SBOE rules were included as part of the SBOE's operating rules.

In conjunction with the adoption of the review of SBOE rules in 19 TAC Chapter 30, Subchapter A, during its January 2009 meeting, the SBOE approved for first reading and filing authorization the proposed amendment to 19 TAC §30.1. As advised by Texas Education Agency (TEA) legal counsel, the amendment adopts in rule as a figure the form used to petition for the adoption of rule changes to ensure compliance with statute and increase public awareness. The form has been posted on the TEA rules website since initial adoption of 19 TAC §30.1 in December 2004. Technical updates are also incorporated throughout the rule, including adding new subsection (d) to clarify that the SBOE may propose language that differs from the language proposed by the petitioner.

The TEA determined that the amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2009-2010 school year in order to implement the latest policy in a timely manner. The effective date is 20 days after filing as adopted.

No comments were received regarding the proposed amendment.

The amendment is adopted under the Texas Government Code, §2001.021, which authorizes a state agency to by rule prescribe the form for a petition and the procedure for the submission, consideration, and disposition.

The amendment implements the Texas Government Code, §2001.021.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901340

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Effective date: April 26, 2009

Proposal publication date: February 13, 2009

For further information, please call: (512) 475-1497



SUBCHAPTER B. STATE BOARD OF EDUCATION: PURCHASING AND CONTRACTS

19 TAC §30.21

The State Board of Education (SBOE) adopts an amendment to §30.21, concerning the historically underutilized business (HUB) program. The amendment is adopted without changes to the proposed text as published in the February 20, 2009, issue of the *Texas Register* (34 TexReg 1169) and will not be republished. The section addresses the HUB program, as required by statute. The amendment updates the rule to reflect the transfer of HUB rules from the Texas Building and Procurement Commission (TBPC) to the Comptroller of Public Accounts.

Texas Government Code, §2161.003, directed each state agency to adopt the state's HUB rules as its own rules. Those rules applied to state agency construction projects and purchases of goods and services paid for with appropriated money. To comply with statute and on the advice of Texas Education Agency (TEA) legal counsel, the SBOE adopted effective December 5, 2004, 19 TAC §30.21, Historically Underutilized Business (HUB) Program, which adopted by reference the TBPC rules concerning the HUB program.

House Bill 3560, 80th Texas Legislature, 2007, transferred certain procurement duties and powers, and the rules related to those duties and powers, from the TBPC to the Comptroller of Public Accounts. The rules concerning the HUB program were transferred and codified as new 34 TAC §§20.11-20.28 effective September 1, 2007. In conjunction with the adoption of the review of SBOE rules in 19 TAC Chapter 30, Subchapter B, during its January 2009, meeting, the SBOE approved for first reading and filing authorization the proposed amendment to 19 TAC §30.21. The adopted amendment updates the SBOE's rule to reflect the transfer of HUB rules from the TBPC to the Comptroller of Public Accounts.

The TEA determined that the amendment will have no direct adverse economic impact for small businesses and microbusi-

nesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2009-2010 school year in order to implement the latest policy in a timely manner. The effective date is 20 days after filing as adopted.

No comments were received regarding the proposed amendment.

The amendment is adopted under the Texas Government Code, §2161.003, which authorizes the State Board of Education to adopt the HUB rules of the state as its own rules.

The amendment implements the Texas Government Code, §2161.003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901341

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Effective date: April 26, 2009

Proposal publication date: February 20, 2009

For further information, please call: (512) 475-1497



CHAPTER 61. SCHOOL DISTRICTS SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1019

The Texas Education Agency (TEA) adopts new §61.1019, concerning additional state aid for ad valorem tax credits under the Texas Economic Development Act. The new section is adopted with changes to the proposed text as published in the December 19, 2008, issue of the *Texas Register* (33 TexReg 10266). The adopted new rule allows the commissioner of education to implement and administer the provisions of the Texas Education Code (TEC), §42.2515, which authorizes an eligible school district to receive state aid equal to the amount of all qualified economic development tax credits credited against the district's ad valorem taxes in a school year under the Texas Tax Code, Chapter 313, Subchapter D.

Pursuant to the Texas Tax Code, Chapter 313 (the Texas Economic Development Act), school districts may offer appraised value limitations on property and tax credits to certain capital-intensive industries that meet dollar and job creation requirements in order to encourage large-scale capital investments in Texas.

The TEC, §42.2515, authorizes the commissioner to adopt rules to implement and administer the provision of additional state aid, including aid for school districts otherwise ineligible for state aid, in order to offset tax credits issued by school districts under the Texas Economic Development Act.

Adopted new 19 TAC §61.1019, Additional State Aid for Ad Valorem Tax Credits under the Texas Economic Development Act,

implements the provisions of the TEC, §42.2515. Specifically, the adopted new rule addresses general provisions; provides definitions, eligibility criteria, and the procedures for filing a request for aid; describes the forms to be used to make a request for aid; and establishes limitations on state aid, the reasons for which and method by which erroneous tax credits will be recovered, the timeline for submission of application requests, and the method of payment of state aid.

In response to public comment, a new subsection (f), describing limitations of tax credits, was added at adoption. Subsections (f) through (i), as filed as proposed, were relettered accordingly, and subsection (c)(2) was amended to correct a cross reference to a relettered subsection.

In addition, a technical edit was made in newly relettered subsection (g). The word *given* was replaced with the word *due* to ensure that a school district could not receive state aid for an amount of tax credit the district gave a taxpayer in excess of what the taxpayer was actually due.

To take advantage of the ad valorem tax credit and receive an adjustment to its state aid, a school district must submit a Request for Additional State Aid for Ad Valorem Tax Credit form to the TEA.

The Request for Additional State Aid for Ad Valorem Tax Credit form requires information on the school district's tax rates, the taxpayer receiving tax credits, the amount of state aid being sought and the year for which it is being sought, and documents dealing with the provision of the tax credits. The form also requires the applicant school district to attach a completed TEA-provided electronic spreadsheet that allows the applicant school district to calculate the amount of the tax credit to be provided to the taxpayer and details the plans for the period the school district will be subject to the value limitation agreement.

The locally maintained paperwork requirements resulting from the adopted new rule correspond with and support the stated procedural and reporting implications.

The TEA determined that the new rule will have no adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period began December 19, 2008, and ended January 20, 2009. Following is a summary of public comments received and corresponding agency responses regarding the proposed new 19 TAC Chapter 61, School Districts, Subchapter AA, Commissioner's Rules on School Finance, §61.1019, Additional State Aid for Ad Valorem Tax Credits under the Texas Economic Development Act.

Comment. A partner at Moak, Casey & Associates commented that the rule's provisions may need to be clarified to indicate whether certain credit limitations would apply only to maintenance and operations (M&O) taxes paid by a taxpayer or to the total taxes paid by the taxpayer, including both M&O and interest and sinking fund taxes.

Agency response. The agency agrees. A new subsection (f) has been added to clarify that the credit limitations would apply to the total taxes paid.

Comment. A partner at Moak, Casey & Associates commented that a school district should be permitted to submit other evidence of a tax refund paid when an initial tax credit is not reflected in a taxpayer's tax statement.

Agency response. The agency agrees. Subsections (d)(2)(D) and (d)(3)(B) explicitly permit a school district to submit as evidence of a tax refund paid either a copy of the tax bill sent to the taxpayer or "other proof that the school district has reimbursed the tax credit to the taxpayer."

Comment. A partner at Moak, Casey & Associates inquired whether the application and accompanying spreadsheet specified in rule were available online.

Agency response. The application form, including the necessary template, will be updated as needed and made available online on the TEA state funding webpage.

The new rule is adopted under the TEC, §42.2515, which authorizes the commissioner of education to adopt rules to implement and administer additional state aid for ad valorem tax credits under the Texas Economic Development Act.

The adopted new rule implements the TEC, §42.2515.

§61.1019. Additional State Aid for Ad Valorem Tax Credits under the Texas Economic Development Act.

(a) **General provisions.** This section implements the Texas Education Code (TEC), §42.2515 (Additional State Aid for Ad Valorem Tax Credits Under Texas Economic Development Act). In accordance with the TEC, §42.2515, a school district, including a school district that is otherwise ineligible for state aid under the TEC, Chapter 42, is entitled to state aid in an amount equal to the amount of all tax credits applied against ad valorem taxes of the school district in each year that tax credits were applied pursuant to the Texas Tax Code, Chapter 313, also known as the Texas Economic Development Act. School districts eligible to receive additional state aid under the TEC, §42.2515, must apply to the commissioner of education in order to receive additional state aid equal to the qualifying ad valorem tax credits issued under the Texas Tax Code, Chapter 313, Subchapter D, subject to certain annual limitations.

(b) **Definitions.** The following phrases, words, and terms, when used in this section, will have the following meanings, unless the context clearly indicates otherwise.

(1) **Eligible property**--A term that has the meaning assigned in the Texas Tax Code, §313.024.

(2) **Limitation on appraised value**--A term that has the meaning assigned in the Texas Tax Code, Chapter 313. A school district may limit the appraised value on a qualified property for the purposes of ad valorem taxation for a period of eight tax years, beginning with the tax year that follows the applicable two-year qualifying time period. A limitation on appraised value applies only to the maintenance and operations portion of a school district's ad valorem tax rate. For each tax year in which the limitation on appraised value is in effect, the appraised value of the qualified property that is described in the written agreement between the school district and taxpayer for school district maintenance and operations ad valorem tax may not exceed the lesser of the market value of the property or the amount to which the school district has agreed, but the limited amount must be at least the minimum amount of limitation that is set for the applicable school district category in the Texas Tax Code, Chapter 313.

(3) **Qualified property**--A term that has the meaning assigned in the Texas Tax Code, §313.021(2).

(4) **Tax credit**--A credit that is made to a taxpayer who has applied for and received a limitation on appraised value under the Texas Tax Code, Chapter 313, from the school district that approved the limitation in an amount equal to the amount of ad valorem taxes paid to that school district that were imposed on the portion of the appraised

value of the qualified property that exceeds the amount of the limitation agreed to by the governing body of the school district under the Texas Tax Code, §313.027(a)(2), in each year in the applicable qualifying time period.

(5) Tax year--The calendar year beginning January 1 in which the taxpayer incurred ad valorem taxes on the qualified property for which the taxpayer is entitled to a tax credit toward ad valorem taxes paid in that tax year.

(6) Texas Economic Development Act--The Texas Tax Code, Chapter 313.

(c) Eligibility for additional state aid.

(1) A school district may be eligible for additional state aid under the TEC, §42.2515, only pursuant to the provisions of the TEC, §42.2515, and the Texas Tax Code, Chapter 313.

(2) A school district must file an application on a form prescribed by the commissioner in accordance with the applicable timeline as described in subsection (i) of this section. A separate application must be made for each tax year for which additional state aid is being requested. An application, including the required supporting documentation described in subsections (d)(2) and (d)(3) of this section, as applicable, must be complete in order for the Texas Education Agency (TEA) to process it.

(3) A school district must be in compliance with the reporting requirements set forth in 34 Texas Administrative Code Chapter 9, Subchapter F (relating to Limitation on Appraised Value and Tax Credits on Certain Qualified Property), to be eligible for additional state aid under the TEC, §42.2515.

(d) Procedures for filing request for additional state aid for ad valorem tax credits.

(1) Method of filing. All requests for additional state aid under the TEC, §42.2515, must be filed by mail with the TEA, 1701 North Congress Avenue, Austin, Texas 78701, in accordance with instructions on the application.

(2) Information required for first year of tax credit. A school district's initial request for additional state aid under the TEC, §42.2515, must include:

(A) a completed Request for Additional State Aid for Ad Valorem Tax Credit application form, including the template that comprises a component of the application showing requested and projected additional state aid for each agreement under the Texas Tax Code, Chapter 313;

(B) a copy of the taxpayer's application to the school district for the tax credit, together with all required attachments to the application;

(C) a copy of the school board's resolution or other proof that the school district has approved the taxpayer's application for the tax credit;

(D) a copy of the tax bill sent to the taxpayer (showing the credit) or other proof that the school district has reimbursed the tax credit to the taxpayer; and

(E) confirmation that, as of the date of the tax credit approval, the taxpayer has not relocated its business outside of the school district.

(3) Information required for subsequent years of tax credit. For each year subsequent to the year in which the initial request for the tax credit was approved, the request for additional state aid under the TEC, §42.2515, must include:

(A) a completed Request for Additional State Aid for Ad Valorem Tax Credit application form, including the template that comprises a component of the application showing requested and projected additional state aid for each agreement under the Texas Tax Code, Chapter 313;

(B) a copy of the tax bill sent to the taxpayer (showing the credit) or other proof that the school district has reimbursed the tax credit to the taxpayer; and

(C) confirmation that, as of the date of the tax credit approval, the taxpayer has not relocated its business outside of the school district.

(e) Forms. The division of the TEA responsible for state funding will make available the application form, including the template, required under subsections (d)(2) and (d)(3) of this section.

(f) Limitation of tax credit. In the fourth through the tenth years in which the agreement described in subsection (b)(2) of this section is in effect, the tax credit is limited to 50% of the total maintenance and operations and interest and sinking fund taxes imposed on the qualified property for the tax year for which the credit applies.

(g) Determination of additional state aid. For any tax year for which additional state aid authorized by the TEC, §42.2515, is approved, additional state aid will be limited to the amount of the tax credit due to the taxpayer for a qualified property that is receiving a limitation on appraised value for that year as determined in the Texas Tax Code, §313.104.

(h) Erroneous tax credits and recovery of state aid for erroneous tax credits. If the comptroller of public accounts or the governing body of the school district determines that an entity that received a tax credit was ineligible to have received it or received more credit than the entity should have received, the school district must provide a notification of the facts to the commissioner within 30 days of the official action. If the TEA determines that an entity that received a tax credit was ineligible to have received it or received more credit than the entity should have received, the commissioner will notify the school district within 30 days of the determination. Any overpayment of additional state aid provided to the school district based on issuance of an erroneous tax credit by the school district will be fully recovered by the TEA pursuant to the TEC, §42.258.

(i) Timeline for submission of application requests.

(1) For tax credits earned under the TEC, §42.2515, for taxes that became due and payable on January 31, 2009, or at any time before that date, the school district must submit its application for additional state aid for ad valorem tax credits on or before May 31, 2009.

(2) For tax credits earned under the TEC, §42.2515, for taxes that become due and payable on January 31, 2010, or at any time after that date, the school district must submit its application for additional state aid for ad valorem tax credits on or before May 31 each year for which the tax credit is due.

(j) Payment to the school district. On approval of a school district's application for additional state aid for ad valorem tax credits by the commissioner, the amount of the credit will be applied to the entitlement due to the school district under the Foundation School Program as follows.

(1) State aid payments for tax credits on taxes that become due and payable after January 31, 2009, will be applied to the school district entitlement as prescribed by the TEC, §42.2516(b-2)(1). Payments for this credit will be incorporated into the payments made under the schedule prescribed by the TEC, §42.259.

(2) State aid payments for tax credits on taxes that were due and payable on January 31, 2009, or at any time before that date will be paid on or before August 31, 2009. This paragraph expires on September 1, 2009.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 3, 2009.

TRD-200901307

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Effective date: April 23, 2009

Proposal publication date: December 19, 2008

For further information, please call: (512) 475-1497



CHAPTER 129. STUDENT ATTENDANCE

SUBCHAPTER B. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

The State Board of Education (SBOE) adopts an amendment to §129.21, concerning student attendance accounting. The amendment is adopted without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 961) and will not be republished. The section provides requirements for student attendance accounting for state funding purposes. The amendment updates the rule to reflect statutory changes and changes in other administrative rules that provide for an alternative attendance accounting program. The amendment modifies certain attendance accounting requirements that school districts must follow.

Section 129.21 provides the student attendance accounting requirements school districts must follow and describes the manner in which student attendance is earned. The rule also provides a list of conditions under which a student who is not actually on campus at the time attendance is taken may be considered in attendance. The adopted amendment updates the rule to reflect statutory changes and changes in other administrative rules that provide for an alternative attendance accounting program and modifies the rule in the following ways.

In subsection (i), exceptions to the stipulation that attendance for all grades must be determined by absences recorded at certain times of the school day were added.

In subsection (i)(1), an explanation of how students enrolled on a full-day basis earn attendance was added.

A new subsection (i)(2) was added to provide an explanation of how students who are enrolled in and participating in an alternative attendance accounting program earn attendance. Existing subsections (i)(2) and (i)(3) were renumbered accordingly.

In subsection (i)(4), renumbered from (i)(3), an exception to the stipulation that students absent at the time attendance is taken are to be counted absent for the entire day was added. Also, an exception to the stipulation that students present at the time attendance is taken are to be counted present for the entire day was added.

In subsection (j), an exception to the stipulation that a student who is not in school at the time attendance is taken must not be counted in attendance was added.

Subsection (k)(4) was modified to clarify that not only are days for travel to and from the site where a student will observe holy days or attend a required court appearance to be counted as excused absences, but so are the days when the student is actually observing the holy days or attending the required court appearance.

A new subsection (k)(5), excusing absences for sounding "Taps" at a military honors funeral held in Texas for a deceased veteran, was added. The existing subsection (k)(5) was renumbered accordingly.

Subsection (k)(6), renumbered from (k)(5), was modified to stipulate that an absence for a documented appointment with a health care professional may be counted as excused only if the student begins classes or returns to school on the same day of the appointment.

Throughout the rule, corrections to word usage were made. The adopted rule action also updates the name of a state agency referenced in the rule.

The Texas Education Agency determined that the amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2009-2010 school year in order to implement the latest policy in a timely manner. The effective date is 20 days after filing as adopted.

No comments were received regarding the proposed amendment.

The amendment is adopted under the Texas Education Code, §42.004, which authorizes the commissioner of education, in accordance with the rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the Texas Education Code, §42.004 and §25.087.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2009.

TRD-200901342

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Effective date: April 26, 2009

Proposal publication date: February 13, 2009

For further information, please call: (512) 475-1497



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 411. STATE MENTAL HEALTH AUTHORITY RESPONSIBILITIES

SUBCHAPTER D. ADMINISTRATIVE HEARINGS OF THE DEPARTMENT IN CONTESTED CASES

25 TAC §§411.151 - 411.160, 411.162, 411.163

The Executive Commissioner of the Health and Human Services Commission (HHSC) on behalf of the Department of State Health Services (department) adopts the repeal of §§411.151 - 411.160, 411.162, and 411.163, concerning administrative hearings in contested cases, without changes to the proposed text as published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 510) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The Texas Department of Mental Health and Mental Retardation originally adopted these rules for its contested case hearings. The Appeals Division of HHSC now provides hearings for the department's mental health program in accordance with its rules in 1 TAC Chapter 357, Subchapter I, regarding hearings under the Administrative Procedure Act.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 411.151 - 411.160, 411.162, and 411.163 have been reviewed and the department has determined that reasons for adopting the sections no longer exist because rules on this subject are superseded by HHSC rules.

SECTION-BY-SECTION SUMMARY

Sections 411.151 - 411.160, 411.162, and 411.163 are repealed in their entirety. The rules are no longer necessary because they are superseded by HHSC rules in 1 TAC Chapter 357, Subchapter I, regarding hearings under the Administrative Procedure Act.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2009.

TRD-200901292

Lisa Hernandez

General Counsel

Department of State Health Services

Effective date: April 21, 2009

Proposal publication date: January 30, 2009

For further information, please call: (512) 458-7111 x6972



CHAPTER 419. MENTAL HEALTH SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER G. MEDICAID FAIR HEARINGS

25 TAC §419.301

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (department) adopts the repeal of §419.301, concerning Medicaid Fair Hearings, without changes to the proposed text as published in the January 30, 2009, issue of the *Texas Register* (34 TexReg 511) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

This rule, §419.301, adopted by the former Texas Department of Mental Health and Mental Retardation, primarily incorporates by reference the HHSC rules relating to Medicaid Fair Hearings. The department offers Medicaid mental health services and notifies eligible clients of their right to a fair hearing when benefits or services are denied, delayed, terminated, reduced, or suspended. In the event that a client requests a fair hearing, the hearing is provided by the Appeals Division of HHSC, and is subject to the HHSC rules in 1 TAC Chapter 357, Subchapter A, Medicaid Fair Hearings.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 419.301 has been reviewed and the department has determined that reasons for adopting the section no longer exist because the rule on this subject is superseded by HHSC rules.

SECTION-BY-SECTION SUMMARY

Section 419.301 is repealed as unnecessary because the rule is superseded by HHSC rules in 1 TAC Chapter 357, Subchapter A, which apply to all Medicaid fair hearings.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule as adopted, has been reviewed

by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeal is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the section implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2009.

TRD-200901291

Lisa Hernandez

General Counsel

Department of State Health Services

Effective date: April 21, 2009

Proposal publication date: January 30, 2009

For further information, please call: (512) 458-7111 x6972



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, AND PROGRAM COMPLETION

SUBCHAPTER D. PROGRAM COMPLETION

37 TAC §85.57

The Texas Youth Commission (TYC) adopts new §85.57, concerning the Release Review Panel, with changes to the proposed text as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10144). Changes to the proposed text are outlined below, as described in the commission's responses to public comments received.

The justification for the new rule is to prevent youth from remaining in a Texas Youth Commission facility beyond his/her minimum length of stay unless the youth is in need of additional rehabilitation in a residential facility. The new rule will establish a Central Office Release Review Panel with the responsibility to determine whether a youth who was committed to TYC under an indeterminate commitment order and who has completed his/her minimum length of stay should be discharged from the custody of the TYC, released under supervision, or given an extended length of stay. The new section will also establish a procedure for requesting reconsideration of a Release Review Panel decision.

Comments concerning the proposed rule were received from the Texas Civil Rights Project and Advocacy Incorporated. The comments are summarized below, along with the commission's responses.

Comment: The composition and credentials of the Review Panel members should be established by rule.

Response: All Panel members will be appointed in compliance with Human Resources Code §61.0815. The commission does not believe that the composition and credentials should be established by rule, as the individual circumstances of youth under review may call for flexibility in the composition of a Panel. No changes to the proposed text were made as a result of this comment.

Comment: The rule should specify the level of due process that is required in order for the review Panel to consider a rule violation as proven. The proposed text would allow for any level of due process hearing, including TYC's current Level III hearings, to be sufficient for review Panel consideration. As currently practiced, Level III hearings do not provide for constitutionally sufficient due process when a child's release from custody is being considered. Level I and Level II hearings do provide the necessary constitutional safeguards and should be the only types of hearings the Panel is allowed to consider.

Response: The commission agrees that additional clarification regarding the level of due process required under this rule should be added. The necessary due process protections have been added to subsection (d)(2)(E).

Comment: The rule allows the Panel to consider any information relevant to the youth's progress and rehabilitation. TYC maintains voluminous documentation on each youth, and in order for children or their parents to prepare a meaningful response, they must be notified as to what information and evidence the Panel will consider.

Response: The commission believes that a review of all relevant information is crucial to the Panel's ability to make informed decisions that strike the proper balance between the youth's rehabilitation needs and public safety. Youth and parents will have extensive and ongoing access to the information the Panel will use. Each youth will be given weekly and monthly feedback concerning progress by his or her treatment team. Additionally, each youth and family will be provided with monthly objectives via the youth's case plan. By means of this ongoing, dynamic process, youth and their families will be provided with extensive information regarding individual progress toward release. Potential evidence regarding progress and participation in treatment programs, rule violations, youth behavior, and other such factors will be discussed with the youth, and parent when possible, as part of normal case management practices well before the youth's case is brought before the Panel. No changes to the proposed text were made as a result of this comment.

Comment: The rule should require the youth to be provided with notice that will delineate the specific issues before the Panel.

Response: As noted above, specific issues regarding progress and participation in treatment programs, rule violations, youth behavior, and other such factors will be discussed with the youth, and parent when possible, as part of standard case management practices. As a result, the youth will be provided with information concerning the issues before the Panel through treatment team meetings and other case management practices. However, the commission agrees that the treatment team should discuss with the youth the reasons they are referring his/her case to the Panel. Additional language requiring such an explanation has been added in subsection (e)(1)(B).

Comment: Several items in the rule are not defined, such as "individual risk and protective factors", "offense cycle", and "major rule violation."

Response: Definitions for Major Rule Violation, as well as Individual Risk and Protective Factors have been added to the text of the rule. The term Offense Cycle was removed and replaced with "conduct similar to the youth's criminal conduct prior to TYC commitment."

Comment: The Panel should be required to make an individualized, specific description of the evidence relied upon and the factors considered when making a decision to extend a youth's length of stay. This information is necessary in order to formulate a meaningful request for reconsideration.

Response: The rule currently provides for a written report to be sent to the parent, guardian, or designated advocate as required by Human Resources Code §61.0815. The commission believes this report includes sufficient information to formulate a meaningful request for reconsideration. While the report may not itemize the specific evidence relied upon to make the determination, potential evidence regarding progress and participation in treatment programs, rule violations, youth behavior, and other such factors will be discussed with the youth, and parent when possible, as part of normal case management practices. No changes were made to the proposed text as a result of this comment.

Comment: The practice of staffing a reconsideration Panel with different staff members than the Panel that issued the extension order should be included in the rule.

Response: The commission cannot guarantee that each member of a reconsideration Panel will be different than the members of the Panel that issued an extension order, and such a practice is not required under statute. No changes were made to the proposed text as a result of this comment.

Comment: To clarify TYC's grievance process, a statement should be added that a decision by a reconsideration Panel exhausts all administrative remedies regarding release after the minimum length of stay expires.

Response: The commission agrees that this statement would help to clarify a youth's available remedies in the event that the Panel issues an extension decision. The statement has been added in subsection (g)(7).

Comment: Rather than stating that "information and arguments *must* be submitted to the Panel on or before the expiration of the youth's minimum length of stay," the text of the rule should read "...information and arguments *should* be submitted..." to allow for extensions when needed.

Response: The commission agrees with the recommendation. The adopted text has been changed from "must" to "should" in subsection (d)(2)(B).

Comment: The rule allows only 15 days from the date of an extension decision to submit a request for reconsideration. This is not sufficient to prepare an adequate and meaningful request. For extensions of longer than 180 days, this deadline should be extended to 30 days.

Response: The commission agrees that there may be cases where more than 15 days is in the youth's best interest. The language in subsection (g)(2) has been amended to state that requests "should" be submitted within 15 days.

Comment: All timelines should be consistently calculated; either with business days or calendar days, but not both.

Response: Business days were inadvertently used in the rule when establishing deadlines. The adopted text will reflect calendar days in subsections (e)(2)(D) and (f)(2).

Comment: The rule should specify that the Panel may only speak with a child after receiving the written consent of any attorney who may represent the child.

Response: The Panel would not necessarily be aware of a youth's representation status. However, when notified that a youth has a representative assisting him/her with the review, the Panel will notify the representative of any scheduled interviews with the youth prior to conducting the interview. Language to this effect has been added to subsection (d)(2)(D).

Comment: Language should be added stating that a youth's refusal to participate in an interview with the Panel shall not be considered in making release or discharge decisions.

Response: The purpose of allowing the Panel full discretion to speak to youth is to provide the youth with an opportunity to speak directly with the Panel members to present information they may wish for the Panel members to be aware of prior to making a decision. The purpose is not to gather evidence against the youth. A statement clarifying that refusal to speak with the Panel will not be held against the youth has been added in subsection (d)(2)(D).

Comment: In order for the Panel to extend a youth's stay in TYC, the rule should require a finding that the treatment a child requires is available in TYC and unavailable in the free world.

Response: There are numerous factors that will contribute to a determination that the commission is the most suitable location for a rehabilitative need to be met. However, the commission does not agree that a "most suitable location" finding requires a finding that specific treatment services are unavailable anywhere outside of TYC. No changes to the proposed text were made as a result of this comment.

Comment: TYC should extend the Review Panel Process to children serving determinate sentences who have completed their minimum length of stay and are eligible for release on parole.

Response: Youth serving determinate sentences who have completed their statutorily required minimum period of confinement were not envisioned by the legislation and were not included in this rule for that reason. No changes to the proposed text were made as a result of this comment.

Comment: TYC should add language to the rule that will provide a better understanding of the rehabilitation expected of youth and that is required from TYC in order for a youth to be discharged or released.

Response: As noted above, progress and participation in treatment programs, youth behavior, and other expectations will be clearly communicated to youth, and parents when possible, as part of standard case management practices. Through meetings with the treatment team and case manager, youth will be provided with specific information concerning individual rehabilitation expectations, as well as release criteria, on an ongoing basis. No changes to the proposed text were made as a result of this comment.

Comment: The rule should provide the youth/parent the opportunity to have a hearing, to present and cross-examine witnesses, and to be appointed an advocate or attorney.

Response: The commission believes the proposed rule provides sufficient opportunities for the youth/parent to present or contest evidence or information considered by the Panel. Youth and parents have significant opportunities for involvement in the youth's rehabilitative goals prior to referral to the Panel. Youth also have the right, at the time when due process hearings are held for serious rule violations, to present and cross-examine witnesses and be represented by an appointed advocate. The commission believes the most appropriate time to challenge whether a rule violation occurred is during the due process hearing held for that purpose, and not when the youth's case is before the Panel for consideration. As stated in the rule, only violations proved through appropriate due process will be considered by the Panel. No changes were made to the rule as a result of this comment.

Comment: The rule should be very clear that the burden of showing the need to extend a child's stay is on TYC, not the youth/parent to show why the stay should not be extended.

Response: The commission believes that the rule sufficiently establishes that the burden of justifying a release/discharge/extension decision rests with the agency. As stated in the proposed text, the Panel may extend a youth's stay only on the basis of clear and convincing evidence that the youth is in need of additional rehabilitation, and that TYC is the most suitable environment for that rehabilitation. Absent clear and convincing evidence that the youth is in need of additional rehabilitation, the Panel must release or discharge the youth. No changes to the proposed text were made as a result of this comment.

Comment: The Panel should be required to disclose the identity of any potential witnesses and the nature of the information they possess to the parent/youth/advocate and provide the opportunity to cross-examine or have similar access to these witnesses.

Response: As noted above, this will be addressed in the normal course of case management. Youth will be provided copies of incident reports at the time the incidents occur. Possible evidence concerning the youth's participation in treatment programs, rule violations, youth behavior, and other expectations will be discussed with the youth, and parent when possible, as part of normal case management practices well before the youth's case is brought before the Panel. The youth will know that facility staff members familiar with his progress and behavior are potential witnesses. No changes to the proposed text were made as a result of this comment.

Comment: The need for obtaining information from victims is questionable. The focus of the Panel should be on the youth and what he or she has done towards rehabilitation.

Response: The commission believes the need to obtain information from victims is both appropriate and necessary under relevant provisions of Texas Code of Criminal Procedure, Chapter 56, and Texas Family Code, Chapter 57.

Comment: The list of factors considered by the Panel should include the nature, scope, and quality of the educational, medical, specialized services, or other treatment programs provided by TYC and whether TYC effectively met the youth's needs. The list of factors considered by the Panel should also include an assessment of whether a youth with a disability is unable to

progress through TYC's programs as a result of his or her disability or TYC's failure to provide reasonable accommodations.

Response: The commission does not believe that such a finding is required under relevant statutes. The required finding that TYC is the most suitable environment for the needed rehabilitation sufficiently addresses whether TYC is able to provide the necessary rehabilitation. No changes were made to the proposed text as a result of this comment.

Comment: The rule should require the Progress Review Team to reexamine, and if necessary, modify any treatment or re-entry plans for youth who receive extensions.

Response: Each youth's case plan is regularly reviewed and modified as part of the youth's ongoing case management. Goals, expectations, and transition planning are addressed at each review. This process is provided for all youth, regardless of whether they have received an extension to their length of stay. No changes to the proposed text were made as a result of this comment.

Comment: Use of the term "accepted" in subsection (g)(6) appears to imply some discretion on the part of the Panel to not consider all requests for reconsideration. The underlying statute requires the Panel to reconsider any extension order that is the subject of a request for reconsideration.

Response: The commission believes the comment misstates the underlying statute. The statute, and therefore the rule, requires the Panel to reconsider any extension order which extends the youth stay (either singularly or cumulatively) by six months. The term "accepted" was used because the commission has chosen to allow reconsiderations in addition to those required by the statute, at the discretion of the Panel if doing so would best serve the rehabilitative needs of the youth.

Comment: The rule allows for a facility administrator to request reconsideration of a release or discharge order if new information becomes available that the Panel was unaware of at the time of its review. The rule must ensure that the youth/parent is accorded an opportunity to be heard in a manner that comports with legal due process where a release or discharge date has been set.

Response: The commission agrees that this statement would help to clarify the notice process for these reviews. A statement to this effect has been added in subsection (h).

The new rule is adopted under Human Resources Code §61.0815, which requires the commission to establish a panel whose function is to review and determine whether a child who has completed the minimum length of stay should be discharged, released, or remain in the custody of the commission for an additional period of time. The section is also adopted under Human Resources Code §61.0816, which requires the commission to establish a process to request the reconsideration of an extension order issued by the panel.

§85.57. Release Review Panel.

(a) Purpose. This rule establishes a release review panel to determine whether a youth who has completed his/her minimum length of stay should be discharged from the custody of the Texas Youth Commission (TYC), released under supervision, or given an extended length of stay. This rule also establishes a process to request reconsideration of an order issued by the release review panel.

(b) Applicability. This rule applies to all youth committed to the TYC without a determinate sentence who have completed the min-

imum length of stay and have not been released to parole or discharged from TYC custody.

(c) Definitions. The following terms, as used in this rule, have the following meanings unless the context clearly indicates otherwise.

(1) Clear and Convincing Evidence--a standard of proof meaning that measure or degree which will produce in the mind of the trier of facts a firm belief or conviction as to the position sought to be established; more than a preponderance of the evidence, but less than beyond a reasonable doubt.

(2) Discharge--legal release from the legal jurisdiction of TYC.

(3) Extension Length of Stay--a period of time in addition to the minimum length of stay that a youth is required to remain in residential placements. An extension length of stay may only be assigned by the Release Review Panel in accordance with provisions of this rule.

(4) Individual Risk and Protective Factors--the dynamic characteristics of a youth's environment, behavior, and mental processes that contribute to the likelihood of further delinquent activity (risk factors) or that contribute to the prevention of delinquent activity (protective factors).

(5) Major Rule Violation--a violation in the most serious category of rule violations for residential facilities, as listed in §95.3 of this title.

(6) Minimum Length of Stay--the minimum period of time a youth is required to remain in residential placements. The minimum length of stay is assigned upon initial commitment, recommitment, or revocation of parole.

(7) Progress Review Team--the TYC residential placement staff or TYC contract placement monitoring staff who are designated by the facility to meet and assess a youth's progress in treatment programming.

(8) Release--movement to parole supervision.

(9) Release Review Panel (or Panel)--the TYC Central Office staff appointed to determine if a youth who has completed his/her minimum length of stay will be discharged, released, or given an extended length of stay.

(10) Residential Placement--a high or medium restriction facility, as defined in §85.27 of this title.

(d) General Provisions.

(1) Panel Members.

(A) The Panel will consist of an odd number of members appointed by the executive commissioner for terms of at least two years.

(B) Each member of the Panel must be a TYC employee who works at the TYC central office. Panel members may not be involved in any supervisory decisions concerning youth in the custody of TYC.

(2) Evidence used by the Panel.

(A) The Panel may review any information relevant to the youth's progress and rehabilitation.

(B) A youth, the parents/guardian of a youth, victims of a youth, or any advocate chosen by a youth may submit information for the Panel's consideration. Information and arguments should be submitted to the Panel in writing on or before the expiration of the youth's minimum length of stay, or if applicable, expiration of the ex-

tension length of stay. A youth may request assistance from any TYC staff member, volunteer, or advocate in communicating with the Panel.

(C) A parent/guardian, victim, or person representing a youth may make a written request for personal communication with a member of the Panel on or before the expiration of the youth's minimum length of stay, or if applicable, expiration of the extension length of stay. The time, place, and manner of communication will be established by the Panel.

(D) The Panel may, at its discretion, interview the youth or any other individual who may have information relevant to the youth's rehabilitation needs. When notified that a youth has a representative assisting him/her with the review, the panel will notify the representative of any scheduled interviews with the youth prior to conducting the interview. A youth's refusal to speak to the Panel will not be held against the youth when making the release decision.

(E) To be considered as a factor in a determination to extend a youth's stay, a violation of the rules of conduct must have been proven via due process which provides advance written notice of the alleged violation, a written statement by the fact finder of the evidence relied upon and the reason for the decision, an opportunity to call witnesses and present evidence, and a neutral decision maker.

(F) Evidence of factors other than rule violations may be considered by the Panel irrespective of its form.

(3) Deadline for Release or Discharge. If the Panel determines that a youth's length of stay should not be extended, TYC must release or discharge the youth within 15 calendar days after the date of the Panel decision.

(e) Completion of Minimum Length of Stay.

(1) Referral by the Progress Review Team. At least 30 calendar days prior to the expiration of a youth's minimum length of stay, the progress review team will determine whether or not the youth meets release criteria. If the progress review team determines the youth does not meet release criteria or recommends discharge of the youth, the following actions will occur:

(A) The progress review team will notify the youth, parent/guardian, and any identified victims that the case has been referred to the Panel for review.

(B) The progress review team will discuss with the youth the reasons for the decision to refer the youth's case to the Panel.

(C) On or before the date the minimum length of stay expires, the progress review team will submit to the Panel any information relevant to the decision on whether the youth is in need of additional rehabilitation in a residential placement.

(2) Panel Decision.

(A) The Panel will make a determination as to whether TYC will discharge the youth, release the youth, or extend the youth's stay in a residential placement.

(B) The Panel may extend the youth's stay only if the Panel determines by majority vote and on the basis of clear and convincing evidence that:

(i) the youth is in need of additional rehabilitation from TYC; and

(ii) a residential placement will provide the most suitable environment for that rehabilitation.

(C) The Panel's determination may include assessments of factors including, but not limited to, the following:

(i) the youth's efforts to reduce individual risk factors and increase individual protective factors;

(ii) length of time in a residential program relative to the youth's conduct;

(iii) degree and quality of the youth's participation in available treatment programs;

(iv) behavior during the youth's length of stay as evidenced by the number and frequency of rule violations confirmed through due process, with special consideration given to:

(I) serious rule violations, aggressive incidents, or criminal conduct; and

(II) incidents that demonstrate conduct similar to the youth's criminal conduct prior to TYC commitment.

(D) If the Panel extends the length of a youth's stay, the Panel must:

(i) specify the additional period of time that the youth must remain in residential placements; and

(ii) provide a written report explaining the reason for the extension to the youth, parent/guardian, and any designated advocate. The report must be provided within 10 calendar days after the date of the Panel decision.

(f) Completion of Extension Length of Stay.

(1) Notification. At least seven calendar days prior to the expiration of an extension length of stay, the Panel will notify the youth, the youth's parents/guardian, and victim(s) that the youth's case is pending review before the Panel.

(2) Panel Decision. The Panel will conduct a review and make a determination to discharge the youth, release the youth, or extend the length of stay in a residential placement. The Panel must mail notification to all parties of the decision within 10 calendar days from the date of the decision.

(g) Request for Reconsideration of an Extension Order.

(1) The youth, the youth's parent/guardian, the youth's designated advocate, the youth's victim(s), a TYC employee, an employee of a TYC contractor, or a person who provides volunteer services at a TYC facility may submit a request for reconsideration of an extension order.

(2) The request for reconsideration must be in writing and should be received by the Panel within 15 calendar days after the date of the written notice explaining the reason for the extension.

(3) The youth may request assistance from any TYC staff member, volunteer or advocate in completing a request for reconsideration.

(4) The person submitting the request for reconsideration must state in the request the reason for the request.

(5) Upon receipt of a request for reconsideration of an extension order, the Panel must reconsider an extension order that:

(A) extends the youth's stay in TYC custody by six months or more; or

(B) combined with previous extension orders, will result in an extension of the youth's stay in TYC custody by six months or more.

(6) The Panel may, at its discretion, accept requests for reconsideration other than those described in paragraph (5) of this sub-

section. For reconsideration requests accepted by the Panel, the Panel will provide a written reply to all parties with an explanation of the Panel's decision. The reply will include an indication that the Panel has considered the information submitted in the request.

(7) A reconsideration decision by the Panel exhausts all administrative remedies regarding release after expiration of the minimum length of stay.

(h) Request for Reconsideration of a Release or Discharge Order. The facility administrator or appropriate contract care monitoring staff may request reconsideration of a release or discharge order at any time prior to the youth's release or discharge if new information becomes available or the youth is alleged to have committed a major rule violation of which the panel was unaware at the time of its original decision. The facility must provide the youth a copy of the request for reconsideration. The youth may provide information to the panel concerning the reason(s) for the request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 2, 2009.

TRD-200901299

Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

Effective date: May 1, 2009

Proposal publication date: December 12, 2008

For further information, please call: (512) 424-6014

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER V. ENFORCEMENT DIVISION 3. REMEDIES IN MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2146

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to §19.2146 in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification, with changes to the proposed text published in the January 23, 2009, issue of the *Texas Register* (34 TexReg 407).

The amendment is adopted to state the criteria DADS will use to determine whether it may waive termination of a nursing facility provider agreement when a nursing facility has had a Category II or III remedy on it three times in an accountability period of 24 months.

A minor editorial correction was made to §19.2146(e)(3) to improve the accuracy of the section.

DADS received no comments regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021(m), which requires the adoption of rules establishing criteria under which DADS may waive termination of a provider agreement.

§19.2146. Termination of Provider Agreement on the Basis of the Imposition of Enforcement Actions Three Times Within an Accountability Period.

(a) If DADS determines that DADS or CMS has imposed a required Category II or III remedy (as defined in 42 Code of Federal Regulations (CFR)) on a facility three times within an accountability period, a recommendation is made to terminate the facility's provider agreement, unless DADS waives termination after considering the factors described in subsection (e) of this section.

(b) DADS notifies a facility in writing of its intention to terminate the facility's provider agreement. Notification occurs within:

(1) three calendar days after receipt of the recommendation of remedies for a facility found in immediate jeopardy; or

(2) 15 calendar days after receipt of the recommendation of remedies for a facility not found in immediate jeopardy.

(c) The provider agreement is terminated on the 20th calendar day after the facility receives notice of DADS' decision to terminate the provider agreement.

(d) An appeal for this remedy is the appeal on the issue of non-compliance that led to the imposition of a Category II or III remedy for the third time within the accountability period. The appeal for this remedy follows the federal procedures in 42 CFR Part 498 for a dually-participating facility or in 42 CFR Part 431 for a facility that is Medicaid-certified only.

(e) DADS may waive termination of a facility's provider agreement when a facility has received a Category II or III remedy three times within an accountability period of 24 consecutive months. DADS may consider one or more of the following to waive termination of a facility's provider agreement:

(1) the history of violations committed by the facility resulting in three Category II or III remedies within an accountability period and the resulting enforcement action compared with the history of violations committed by other facilities that received Category II or III remedies three times within an accountability period and the resulting enforcement action;

(2) the history of ownership of the facility when the Category II or III remedies were imposed; or

(3) the efforts the facility has made to correct the violations that resulted in the imposition of the Category II or III remedies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2009.

TRD-200901297

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Effective date: April 21, 2009

Proposal publication date: January 23, 2009

For further information, please call: (512) 438-3734



CHAPTER 49. CONTRACTING FOR COMMUNITY CARE SERVICES SUBCHAPTER D. BILLINGS AND PAYMENT 40 TAC §49.43

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of §49.43, in Chapter 49, Contracting for Community Care Services, without changes to the proposal as published in the January 23, 2009, issue of the *Texas Register* (34 TexReg 408).

The repeal is adopted to delete the requirements governing the expedited payments system (EPS), including provider eligibility requirements, participation requirements, and billing options. Since the implementation of the Claims Management System (CMS) in 1999, DADS has made several improvements to claims submittal available to providers. Due to these improvements, providers are able to receive payment more expediently, generally within five to seven days of a claim submittal. In addition, the Texas Medicaid and Healthcare Partnership claims systems currently processes provider claims in a timely fashion, eliminating the need for the EPS.

DADS received no comments regarding adoption of the repeal.

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 1, 2009.

TRD-200901296

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: April 30, 2009
Proposal publication date: January 23, 2009
For further information, please call: (512) 438-3734

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PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD

SUBCHAPTER C. PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

40 TAC §§175.100 - 175.111

The Veterans Land Board (VLB) adopts new §§175.100 - 175.111 in order to provide the availability of Alternative Dispute Resolution procedures for parties of internal and external disputes pending before the VLB. The rules are adopted without changes to the proposed text as published in the February 13, 2009, issue of the *Texas Register* (34 TexReg 973) and will not be republished.

Chapter 2009 of the Texas Government Code, which was enacted by the 75th Legislature in 1997 and is known as the Governmental Dispute Resolution Act, established the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution (ADR) procedures in appropriate aspects of the governmental body's operation and programs. The 80th Legislature in 2007 enacted §161.036 of the Texas Natural Resource

Code to further encourage the use of alternative dispute resolution rules to assist in the resolution of internal and external disputes under the Board's jurisdiction, other than disputes governed by §161.311. In order to adhere to and to adopt this legislatively mandated policy, the VLB is adopting a body of new rules that provide ADR procedures as an option for resolving disputes pending before the VLB.

No comments were received on the adoption of this amendment.

Chapter 2009 of the Texas Government Code establishes the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operation and programs. Chapter 2009 provides authority for the VLB to adopt alternative dispute resolution rules necessary to implement this policy.

Section 161.036 of the Texas Natural Resources Code provides further authority for the VLB to adopt alternative dispute resolution rules necessary to implement this policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2009.

TRD-200901273

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Texas Veterans Land Board

Effective date: April 20, 2009

Proposal publication date: February 13, 2009

For further information, please call: (512) 475-1859

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Office of the Governor

Title 1, Part 1

In accordance with §2001.039, Texas Government Code, the Office of the Governor submits the following notice of intention to review the rules found in Chapter 3 relating to the Criminal Justice Division. Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist.

Comments on this rule review may be submitted to Heather Morgan, Office of the Governor, Criminal Justice Division, at hmorgan@gov-ernor.state.tx.us; P.O. Box 12428, Austin, Texas 78711; or (512) 463-1919. Comments must be received no later than 30 days from the date of publication of this Proposed Rule Review in the *Texas Register*.

TRD-200901293

Kevin Green

Assistant General Counsel

Office of the Governor

Filed: April 1, 2009

TRD-200901380

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Filed: April 8, 2009

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 101, Assessment, Subchapter AA, Commissioner's Rules Concerning the Participation of Limited English Proficient Students in State Assessments; Subchapter BB, Commissioner's Rules Concerning the Student Success Initiative; Subchapter CC, Commissioner's Rules Concerning Implementation of Testing Program; Subchapter DD, Commissioner's Rules Concerning Alternative Exit-Level Assessments; Subchapter EE, Commissioner's Rules Concerning the Statewide Testing Calendar and UIL Participation; and Subchapter FF, Commissioner's Rules Concerning Diagnostic Assessment, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 101, Subchapters AA-FF, in the February 6, 2009, issue of the *Texas Register* (34 TexReg 859).

Relating to the review of 19 TAC Chapter 101, Subchapters AA-EE, the TEA finds that the reasons for adopting Subchapters AA-EE continue to exist and readopts the rules. The TEA received no comments related to the review of Subchapters AA-EE. At a later date, the TEA may propose revisions to Subchapters AA-EE to update rules and align with statute, including any changes that may result from the 81st Texas Legislature, 2009.

Relating to the review of 19 TAC Chapter 101, Subchapter FF, the TEA finds that the reasons for adopting Subchapter FF continue to exist and readopts the rule. The TEA received no comments related to the review of Subchapter FF. No changes are necessary as a result of the review.

This concludes the review of 19 TAC Chapter 101.

TRD-200901381

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Filed: April 8, 2009

Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) adopts the review of 19 TAC Chapter 101, Assessment, Subchapter A, General Provisions; Subchapter B, Development and Administration of Tests; Subchapter C, Security and Confidentiality; Subchapter D, Scoring and Reporting; and Subchapter E, Local Option, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 101, Subchapters A-E, in the February 6, 2009, issue of the *Texas Register* (34 TexReg 859).

The SBOE finds that the reasons for adopting 19 TAC Chapter 101, Subchapters A-E, continue to exist and readopts the rules. The SBOE received no comments related to the review of Subchapters A-E. At a later date, the SBOE may propose revisions to Subchapters A-E to update rules and align with statute, including any changes that may result from the 81st Texas Legislature, 2009.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Board of Chiropractic Examiners

Notice of Public Hearing to Receive Public Comments on
Proposed New §75.21

The Texas Board of Chiropractic Examiners (TBCE) regulates the practice of chiropractic in Texas. The Rules Committee (or staff) of the TBCE will host a public hearing on April 28, 2009 to receive comments from all interested parties concerning the TBCE's proposed new §75.21, relating to acupuncture to set forth the minimal acceptable qualifications and procedures for the practice of acupuncture by licensed doctor of chiropractic. The proposed new section was published in the January 2, 2009, issue of the *Texas Register* (34 TexReg 22).

Acupuncture has long been part of the practice of chiropractic, and the practice of acupuncture by chiropractors has been authorized since the Legislature amended the Acupuncture Act in 1997 to allow chiropractors and other health care practitioners to practice acupuncture when they are acting within the scope of their licenses (See Texas Occupations Code §205.003). Post-graduate training in acupuncture is offered by the chiropractic colleges, and the National Board of Chiropractic Examiners (NBCE) offers a national standardized certification examination in acupuncture, in addition to the 4,500 didactic and clinical hours required for licensure (See <http://www.nbce.org/written/desc-acu.html>). The Board has not received complaints regarding the practice of acupuncture by a chiropractor. However, these training requirements are needed in order to bring the licensing standards in Texas into line with the licensing standards of other states.

The Board has previously determined that acupuncture is within the scope of practice of chiropractic in Texas (See 22 TAC §75.17, relating to scope of practice). The practice of acupuncture by a chiropractor is both authorized and limited by the Chiropractic Act (See Texas Occupations Code §201.002(b)). The Board's existing rule regarding proper diligence and efficient practice of chiropractic, §75.2 of this title, requires that a chiropractor not perform or attempt to perform procedures in which the chiropractor is untrained by education or experience.

The public hearing on proposed new §75.21 will be held at the following date, time and location.

Date: April 28, 2009

Time: 1:00 p.m.

Location: William P. Hobby Building, Tower 2, Room 225

333 Guadalupe, Austin, Texas 78701

To provide written comment, please contact Glenn Parker, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe, Suite 3-825, Austin, Texas 78701; e-mail: glenn.parker@tbce.state.tx.us; telephone: (512) 305-6706.

TRD-200901304

Glenn Parker

Executive Director

Texas Board of Chiropractic Examiners

Filed: April 3, 2009

Comptroller of Public Accounts

Notice to Persons Interested in the 2009 International Energy
Conservation Code

Pursuant to 34 TAC §19.52, this notice is provided to interested persons that the State Energy Conservation Office (SECO) is accepting written comments on the International Energy Conservation Code published January, 2009.

To achieve energy conservation in all commercial and industrial construction and in residential construction other than single-family residential construction, Texas Health and Safety Code, §388.003(b), adopted the International Energy Conservation Code as it existed on May 1, 2001, as the energy code for use in this state for all such construction. Texas Health and Safety Code, §388.003(b-1), authorizes SECO to adopt the new or latest published edition of the International Energy Conservation Code if it will result in residential or commercial energy efficiency and air quality that is equivalent to or better than the 2001 Code. SECO will receive a recommendation from the Energy Systems Laboratory at the Texas Engineering Experiment Station of The Texas A&M University System ("Laboratory") on the efficacy of the 2009 International Energy Conservation Code compared to the version of that Code as it existed on May 1, 2001. Texas Health and Safety Code, §388.003(b-3), requires the Laboratory to consider the written comments of interested parties that have been submitted to SECO within 30 days of the publication of this notice.

Comments are encouraged from any persons interested in the International Energy Conservation Code, including without limitation: commercial and residential builders; architects and engineers; municipal, county, and other local government authorities; and environmental groups. Copies of both the International Energy Conservation Code as it existed on May 1, 2001 as well as the International Energy Conservation Code published in January 2009 are available for purchase through International Code Council website <http://www.icc-safe.org/e/category.html?q=x>. Also, copies of these codes are available for viewing during regular business hours at the SECO office located at the Lyndon Baines Johnson (LBJ) State Office Building, 111 E. 17th Street, Suite 1114, Austin, Texas 78774. Written comments may be submitted in person at the SECO office, electronically through the SECO's electronic mail address specified on SECO's website <http://www.seco.cpa.state.tx.us/>, or through the United States Postal Service at the State Energy Conservation Office, Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528.

All written comments submitted no later than 30 days following the publication date of this notice will be forwarded to the Laboratory by SECO.

TRD-200901305

Martin Cherry

General Counsel

Comptroller of Public Accounts

Filed: April 3, 2009

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/13/09 - 04/19/09 is 18% for Consumer ¹/Agricultural/Commercial ²/credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/13/09 - 04/19/09 is 18% for Commercial over \$250,000.

The monthly ceiling as prescribed by §303.005³ for the period of 04/01/09 - 04/30/09 is 18% for Consumer/Agricultural/Commercial/credit through \$250,000.

The monthly ceiling as prescribed by §303.005 for the period of 04/01/09 - 04/30/09 is 18% for Commercial over \$250,000.

¹Credit for business, commercial, investment or other similar purpose

²Credit for business, commercial, investment or other similar purpose.

³For variable rate commercial transactions only.

TRD-200901363

Leslie L. Pettijohn

Commissioner

Office of Consumer Credit Commissioner

Filed: April 7, 2009

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 18, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 18, 2009**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment

procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Air Liquide LI GP, LLC; DOCKET NUMBER: 2009-0425-WQ-E; IDENTIFIER: RN100670744; LOCATION: Ector County; TYPE OF FACILITY: industrial gas manufacturing; RULE VIOLATED: 30 Texas Administrative Code (TAC) §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(2) COMPANY: Mr. Bill Nichols dba Bills Double Six Mini Mart; DOCKET NUMBER: 2009-0379-PST-E; IDENTIFIER: RN102283181; LOCATION: Breckenridge, Stephens County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: \$875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: Bobby Johnson dba Blastmasters; DOCKET NUMBER: 2008-1054-AIR-E; IDENTIFIER: RN104916424; LOCATION: Kilgore, Gregg County; TYPE OF FACILITY: painting and sand blasting plant; RULE VIOLATED: 30 TAC §116.110(a), Agreed Order Number 2006-1971-AIR-E, Ordering Provision Number 2.c., and Texas Health and Safety Code (THSC), §382.0518(a) and §382.085(b), by failing to obtain air permit authorization; PENALTY: \$16,200; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Bonham; DOCKET NUMBER: 2008-1512-MWD-E; IDENTIFIER: RN101919850; LOCATION: Fannin County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §30.350(d) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010070001, Other Requirements Number 1, by failing to employ an operator with the required license level to perform regulated activity at the facility; 30 TAC §305.125(1) and TPDES Permit Number WQ0010070001, Monitoring and Reporting Requirements Number 7.c., by failing to submit the noncompliance notification when any effluent violation deviates by more than 40% of the permitted limit; 30 TAC §319.11(b), by failing to utilize the proper sampling and laboratory testing methods; and 30 TAC §305.125(1) and TPDES Permit Number WQ0010070001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, by failing to comply with permit effluent limits; PENALTY: \$26,125; Supplemental Environmental Project (SEP) offset amount of \$26,125 applied to providing first time wastewater service to two low income homes currently utilizing failing or inadequately designed septic systems; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5700.

(5) COMPANY: Citgo Refining and Chemicals Company L.P.; DOCKET NUMBER: 2008-1793-AIR-E; IDENTIFIER: RN102555166; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: petroleum refining plant; RULE VIOLATED: 30 TAC §101.201(c) and §122.143(4), Federal Operating Permit (FOP) Number O-01423, Special Condition (SC) Number 2.F., and THSC, §382.085(b), by failing to submit a final emissions event report within two weeks after the end of the event; 30 TAC §§101.20(3), 111.111(a)(1)(B), 116.115(b)(2)(F) and (c), and 122.143(4), New Source Review (NSR) Permit Numbers 9604A/PSD-TX-653 and 3390A, SC Number 1, FOP Number O-01423, SC Numbers 1.A. and 31, and THSC, §382.085(b), by failing to prevent unauthorized

emissions and to limit opacity to 20%; 30 TAC §101.211(b)(1)(H) and (I) and §122.143(4), FOP Number O-01423, SC Number 2.G., and THSC, §382.085(b), by failing to list all compounds and total quantities associated with a startup activity; and 30 TAC §101.20(3) and §116.115(c), NSR Permit Number 9604A/PSD-TX-653, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$20,459; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(6) COMPANY: Conner Steel Products, Inc.; DOCKET NUMBER: 2008-1679-AIR-E; IDENTIFIER: RN102602307; LOCATION: San Angelo, Tom Green County; TYPE OF FACILITY: tank manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1) and (2), FOP Number O-2820, Special Terms and Conditions (STC) Number 7, and THSC, §382.085(b), by failing to submit an annual compliance certification report; and 30 TAC §113.960 and §116.115(c), 40 Code of Federal Regulations (CFR) §63.3890(b)(1), NSR Permit Number 74024, SC Number 4, and THSC, §382.085(b), by failing to limit hazardous air pollutant emissions; PENALTY: \$32,600; SEP offset amount of \$13,040 applied to San Angelo Friends of the Environment; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(7) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2008-1890-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 5920A, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$10,000; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Cooper Medical Buildings, Inc.; DOCKET NUMBER: 2009-0426-WQ-E; IDENTIFIER: RN105694814; LOCATION: Hereford, Deaf Smith County; TYPE OF FACILITY: medical center; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: DJL Ventures, Inc. and Bulverde-Spring Branch Emergency Medical Services; DOCKET NUMBER: 2009-0212-MLM-E; IDENTIFIER: RN105674766; LOCATION: Comal County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activities; and 30 TAC §213.23(a)(1), by failing to obtain approval of an Edwards Aquifer contributing zone plan; PENALTY: \$1,900; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(10) COMPANY: Eberle Materials, Inc.; DOCKET NUMBER: 2009-0424-WR-E; IDENTIFIER: RN105682470; LOCATION: Hidalgo County; TYPE OF FACILITY: highway and street construction; RULE VIOLATED: the Code, §11.081 and §11.121, by impounding, diverting, or using state water without a required permit; PENALTY: \$350; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 1804 West Jefferson Avenue, Hidalgo, Texas 78550-5247, (956) 425-6010.

(11) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2008-1167-AIR-E; IDENTIFIER: RN100542711; LO-

CATION: Orange, Orange County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 9629, SC Number 12, FOP Number O-02331, General Terms and Conditions (GTC), STC Number 6, and THSC, §382.085(b), by failing to operate the cogeneration train at or below the nitrogen oxide (NO_x) concentration point of 96 parts per million; 30 TAC §§101.20(1), 116.115(c), 117.140(c)(1) and (e), 117.340(c)(1) and (f)(1), 117.8100(a)(1)(B)(i), and 122.143(4), FOP Number O-02331, GTC, STC Numbers 1A, 1D, 4B, 4F, and 6, NSR Permit Number 9629, SC Number 3, 40 CFR §§60.8, 60.13, 60.46b(c) and (f)(1), and 60.48b(b)(1), and THSC, §382.085(b), by failing to conduct a relative accuracy test (RAT) and a seven-day calibration drift (CD) test on a NO_x analyzer; 30 TAC §§101.20(1), 116.115(c), 117.140(e) and (d), 117.8100(a)(1)(B)(iii), 117.340(f)(1) and (e), 117.8120(1)(A), and 122.143(4), FOP Number O-02331, GTC, STC Numbers 1A, 1D, 4B, 4F, and 6, NSR Permit Number 9629, SC Number 3, 40 CFR §§60.8, 60.13, 60.46b(c) and (f)(1), and THSC, §382.085(b), by failing to conduct a RAT and a seven-day CD test on a carbon monoxide analyzer; 30 TAC §116.115(b)(2)(F) and §122.143(4), FOP Number O-02001, GTC, NSR Permit Number 9176, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.211(b) and §122.143(4), FOP Number O-02001, GTC, STC Number 2G, and THSC, §382.085(b), by failing to submit a final record for an emissions event; PENALTY: \$31,408; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(12) COMPANY: Gregory Power Partners, L.P.; DOCKET NUMBER: 2009-0060-AIR-E; IDENTIFIER: RN102547957; LOCATION: Gregory, San Patricio County; TYPE OF FACILITY: natural gas-fired electric generating, cogeneration plant; RULE VIOLATED: 30 TAC §116.110(a) and §116.315(a) and THSC, §382.0518(a) and §382.085(b), by failing to submit an application for renewal; PENALTY: \$15,250; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(13) COMPANY: City of Groesbeck; DOCKET NUMBER: 2009-0108-PWS-E; IDENTIFIER: RN101384741; LOCATION: Limestone County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.42(e)(4)(C), by failing to provide adequate ventilation; 30 TAC §290.42(f)(1)(C), by failing to provide day tanks and bulk storage tanks with a label that identifies the tanks contents and a device that indicates the amount of chemical remaining in the tank; 30 TAC §290.43(c)(2), by failing to provide a gasket that forms a positive seal on the hatch of the roof access opening; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence; 30 TAC §290.43(c)(4), by failing to provide the water storage tank with a liquid level indicator; 30 TAC §290.46(s)(2)(B)(i) and (C)(ii), by failing to calibrate the benchtop turbidimeters with primary standards; and 30 TAC §290.44(h)(1)(A), by failing to install a backflow prevention assembly or an air gap at all residences and establishments; PENALTY: \$3,378; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: H.O.T. Transport, Limited; DOCKET NUMBER: 2007-0465-IHW-E; IDENTIFIER: RN102906534; LOCATION: Lufkin, Angelina County; TYPE OF FACILITY: chemical transporter; RULE VIOLATED: 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.62 and 40 CFR §262.11, by failing to conduct a hazardous waste determination; 30 TAC §335.6(c), by failing to notify the executive director of waste regulated activities; 30 TAC §335.11, by failing to properly dispose of industrial solid waste at an authorized facility; and 30

TAC §335.10(a)(1), by failing to manifest industrial solid waste; PENALTY: \$15,000; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: INEOS USA LLC; DOCKET NUMBER: 2008-1816-AIR-E; IDENTIFIER: RN100238708; LOCATION: Alvin, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §117.340(a) and §122.143(4), FOP Number O-02327, STC Number 1A, and THSC, §382.085(b), by failing to install totalizing fuel flow meters with an accuracy of ±5% on all applicable combustion engines; 30 TAC §§101.20(3), 116.715(a), and 122.143(4), NSR Permit Number 95/PSD-TX-854, SC Number 37A, FOP Number O-02327, STC Number 18, and THSC, §382.085(b), by failing to conduct fugitive monitoring on 11,782 flanges and connectors in volatile organic compound service; and 30 TAC §§101.20(3), 116.715(a), and 122.143(4), NSR Permit Number 95/PSD-TX-854, SC Number 1, FOP Number O-02327, STC Number 18, and THSC, §382.085(b), by failing to maintain the emissions limit within the maximum allowable emission rate table; PENALTY: \$180,951; SEP offset amount of \$72,380 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Joseph Realty Group, LLC; DOCKET NUMBER: 2009-0049-EAQ-E; IDENTIFIER: RN105641864; LOCATION: Round Rock, Williamson County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Protection Plan; PENALTY: \$2,250; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(17) COMPANY: Lake Whitney Resorts, LLC; DOCKET NUMBER: 2008-1942-MLM-E; IDENTIFIER: RN105215651; LOCATION: Whitney, Hill County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e)(3)(A) and THSC, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a minimum of a Class "D" license; 30 TAC §290.45(f)(1), (4), and (5), by failing to provide a purchase water contract in order to properly evaluate the facility's production, storage, service pump, or pressure maintenance capacity; 30 TAC §290.46(n)(2), by failing to provide an up-to-date map of the distribution system; 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system; 30 TAC §290.46(f)(2) and (3)(A)(iv), by failing to provide facility records to commission personnel at the time of the investigation; 30 TAC §290.46(h), by failing to maintain a supply of calcium hypochlorite disinfectant on hand for use when making repairs, setting meters, and disinfecting new mains; 30 TAC §290.121(a) and (b)(1), by failing to make available for commission review a complete up-to-date chemical and microbiological monitoring plan; 30 TAC §290.42(1), by failing to compile and maintain a plant operations manual for operator review and reference; and 30 TAC §288.20(a) and §288.30(5)(B), by failing to submit a drought contingency plan; PENALTY: \$5,094; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(18) COMPANY: Maximus Coffee Group, LP; DOCKET NUMBER: 2008-1619-AIR-E; IDENTIFIER: RN100214931; LOCATION: Houston, Harris County; TYPE OF FACILITY: coffee processing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(C), Air Operating Permit Number O-01018, GTC, and THSC, §382.085(b),

by failing to timely submit the deviation report; PENALTY: \$3,500; ENFORCEMENT COORDINATOR: Ross Fife, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: M. J. Boyle General Contractor, Inc.; DOCKET NUMBER: 2009-0382-WQ-E; IDENTIFIER: RN105681712; LOCATION: Comal County; TYPE OF FACILITY: individual and family social services; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(20) COMPANY: O'DONNELL OIL & BUTANE COMPANY, INC. dba Borden County Key Pumps; DOCKET NUMBER: 2009-0187-PST-E; IDENTIFIER: RN101879286; LOCATION: near O'Donnell, Borden County; TYPE OF FACILITY: aboveground storage tank (AST) with key-operated fuel pumps for retail sales of gasoline and diesel; RULE VIOLATED: 30 TAC §334.126(a)(1), by failing to file a written notification with the TCEQ at least 30 days prior to installing an AST; and 30 TAC §334.127(c) and the Code, §26.346, by failing to submit an AST registration; PENALTY: \$1,855; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

(21) COMPANY: OHM SAI, INC. dba Docs One Stop; DOCKET NUMBER: 2009-0248-PST-E; IDENTIFIER: RN101491660; LOCATION: Jarrell, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.222(3) and THSC, §382.085(b), by failing to ensure that no gasoline leaks exist anywhere in the liquid transfer or vapor balance system; 30 TAC §115.222(6) and THSC, §382.085(b), by failing to ensure that each underground storage tank (UST) vent line is equipped with a pressure-vacuum relief valve; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; and 30 TAC §334.10(b) and §334.49(e), by failing to maintain UST records and make them immediately available upon request; PENALTY: \$5,728; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(22) COMPANY: RACETRAC PETROLEUM, INC. dba Race-trac 574; DOCKET NUMBER: 2009-0177-PST-E; IDENTIFIER: RN102221009; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §290.51(a)(3) and the Code, §5.702, by failing to pay outstanding water system fees and associated late fees; PENALTY: \$4,846; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Eusebio Rodriguez, Jr. dba Rodriguez Best Pic & Meats; DOCKET NUMBER: 2008-1872-PST-E; IDENTIFIER: RN102249299; LOCATION: Weslaco, Hidalgo County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(C), by failing to obtain a delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code,

§26.3467(a), by failing to make available to a common carrier a valid, current delivery certificate; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST for releases; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: \$13,750; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(24) COMPANY: Sanderson Farms, Inc. (Production Division); DOCKET NUMBER: 2009-0190-PWS-E; IDENTIFIER: RN105161178; LOCATION: Waco, McLennan County; TYPE OF FACILITY: poultry processing plant with public water supply; RULE VIOLATED: 30 TAC §290.45(d)(2)(B)(v) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 220 gallons; PENALTY: \$525; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(25) COMPANY: Seminole Pipeline Company; DOCKET NUMBER: 2009-0115-AIR-E; IDENTIFIER: RN104473343; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: pipeline; RULE VIOLATED: THSC, §382.085(a), by failing to prevent unauthorized emissions; PENALTY: \$5,000; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: Shanco Group, LLC dba Midtown Grocery; DOCKET NUMBER: 2009-0423-PST-E; IDENTIFIER: RN101663367; LOCATION: Brazos County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ delivery certificate prior to receiving fuel; PENALTY: \$875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(27) COMPANY: Shell Oil Company; DOCKET NUMBER: 2008-1621-AIR-E; IDENTIFIER: RN100211879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), FOP Number O-01669, GTC, and THSC, §382.085(b), by failing to submit the annual permit compliance certification; and 30 TAC §101.20(3) and §116.715(a) and (c)(7), Flexible Permit Number 21262/PSD-TX-928, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$21,275; SEP offset amount of \$10,637 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: City of Shepherd; DOCKET NUMBER: 2009-0017-MWD-E; IDENTIFIER: RN101916666; LOCATION: San Jacinto County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011380001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for ammonia nitrogen; and 30 TAC §305.125(17) and TPDES Permit Number WQ0011380001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: \$6,910; SEP offset amount of \$5,528 applied to Texas

Association of Resource Conservation and Development Areas, Inc. - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 425-6010; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(29) COMPANY: John D. Sims; DOCKET NUMBER: 2009-0376-OSI-E; IDENTIFIER: RN103685483; LOCATION: Lufkin, Angelina County; TYPE OF FACILITY: onsite sewage; RULE VIOLATED: 30 TAC §283.61(4), by failing, as an installer, to ensure that an authorization to construct has been issued prior to beginning construction of an onsite sewage facility; PENALTY: \$175; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(30) COMPANY: The Dow Chemical Company; DOCKET NUMBER: 2008-1723-AIR-E; IDENTIFIER: RN100225945; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(1), 101.221(a), and 116.115(c), Air Permit Numbers 834 and 20909, SC Number 1, 40 CFR §60.18(c), and THSC, §382.085(b), by failing to prevent unauthorized emissions and to operate a flare with a flame or pilot flame present; and 30 TAC §116.715(a), Air Permit Number 20432, SC Chapter III-1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$63,000; SEP offset amount of \$31,500 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(31) COMPANY: The Premcor Refining Group, Inc.; DOCKET NUMBER: 2008-1043-AIR-E; IDENTIFIER: RN102584026; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a) and (c)(7), Permit Number 6825A/PSD-TX-49, SC Number 5A, and THSC, §382.085(b), by failing to prevent the release of unauthorized contaminants into the atmosphere; PENALTY: \$17,100; SEP offset amount of \$6,840 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(32) COMPANY: Timberlake Trails LLC; DOCKET NUMBER: 2009-0381-WQ-E; IDENTIFIER: RN105345714; LOCATION: Denton County; TYPE OF FACILITY: land subdividers and developers; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: VIMEX ENTERPRISES, INC. dba Audrey Shell; DOCKET NUMBER: 2008-1939-PST-E; IDENTIFIER: RN104431473; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; PENALTY: \$9,692; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200901368

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: April 7, 2009



Enforcement Orders

An agreed order was entered regarding M & K Pantry, L.C. dba Lumberton Chevron and dba M & K Pantry 4, Docket No. 2004-0675-PST-E on March 27, 2009, assessing \$21,825 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Ann Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was entered regarding Dahisar Business, Inc. dba Honey Stop 2, Docket No. 2006-0603-PST-E on March 27, 2009, assessing \$37,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney, at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Myung & Choon Kim, Inc. dba Town & Country Cleaners and dba Viking Cleaners, Docket No. 2006-1265-DCL-E on March 27, 2009, assessing \$2,370 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney, at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Afzal Shekhani dba Bender Texaco, Docket No. 2006-1565-PST-E on March 27, 2009, assessing \$11,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Texas Gas, Inc. dba WTG San Angelo Warehouse 210100, Docket No. 2007-0311-PST-E on March 27, 2009, assessing \$30,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Diamond Shamrock Refining Company, L.P., Docket No. 2007-0314-AIR-E on March 27, 2009, assessing \$30,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding IZR Corporation dba Garland Fina, Docket No. 2007-0409-PST-E on March 27, 2009, assessing \$11,102 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney, at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding W W Cattle Feeds, Inc., Docket No. 2007-0775-WQ-E on March 27, 2009, assessing \$3,640 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney, at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding I.M.C. Waste Disposal, Inc., Docket No. 2007-1176-MSW-E on March 27, 2009, assessing \$1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney, at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Frank Lamas dba Lamas Surplus, Docket No. 2007-1212-WQ-E on March 27, 2009, assessing \$4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mannesmann DMV Stainless USA, Inc., Docket No. 2007-1260-AIR-E on March 27, 2009, assessing \$4,020 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney, at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Emilio Garza, Docket No. 2007-1281-LII-E on March 27, 2009, assessing \$262 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Richard Brannan, Docket No. 2007-1552-PST-E on March 27, 2009, assessing \$2,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney, at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Cowcatchers, L.L.C., Docket No. 2007-1578-PWS-E on March 27, 2009, assessing \$3,757 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Roscoe, Docket No. 2007-1815-MWD-E on March 27, 2009, assessing \$6,300 in administrative penalties with \$1,260 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator, at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rex D. Melton, Docket No. 2007-1886-LII-E on March 27, 2009, assessing \$1,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shumard Corporation dba Associated Fiberglass Enterprises, Docket No. 2007-1946-AIR-E on March 27, 2009, assessing \$32,500 in administrative penalties with \$6,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator, at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Patrick H. Hetherly, Docket No. 2008-0357-PST-E on March 27, 2009, assessing \$8,925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2008-0391-AIR-E on March 27, 2009, assessing \$62,369 in administrative penalties with \$12,472 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator, at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Geosource, Inc. dba Geosource aka Wagner Materials, Docket No. 2008-0501-MLM-E on March 27, 2009, assessing \$3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Casey Croy, Docket No. 2008-0563-MSW-E on March 27, 2009, assessing \$3,960 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tracy Chandler, Staff Attorney, at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Westphalia Water & Sewer Supply Corporation, Docket No. 2008-0598-MWD-E on March 27, 2009, assessing \$7,245 in administrative penalties with \$1,449 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator, at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nile J. Patterson, Jr., Docket No. 2008-0953-PST-E on March 27, 2009, assessing \$5,500 in administrative penalties with \$1,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2008-0989-AIR-E on March 27, 2009, assessing \$51,150 in administrative penalties with \$10,230 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator, at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Crowell, Docket No. 2008-0991-MWD-E on March 27, 2009, assessing \$12,600 in administrative penalties with \$2,520 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator, at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Hempstead, Docket No. 2008-0999-MWD-E on March 27, 2009, assessing \$3,900 in administrative penalties with \$780 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator, at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jeff Davidson dba C & W One Stop 12, Docket No. 2008-1125-PST-E on March 27, 2009, assessing \$9,880 in administrative penalties with \$1,976 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AK/HA Manufacturing, LLC, Docket No. 2008-1153-AIR-E on March 27, 2009, assessing \$10,050 in administrative penalties with \$2,010 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator, at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hyon Walk dba Chantz Cleaners, Docket No. 2008-1195-DCL-E on March 27, 2009, assessing \$1,535 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator, at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SHANE TRANSPORTATION, INC, Docket No. 2008-1328-PST-E on March 27, 2009, assessing \$4,100 in administrative penalties with \$820 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Timber Lane Utility District, Docket No. 2008-1353-MWD-E on March 27, 2009, assessing \$10,250 in administrative penalties with \$2,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator, at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bobby Enterprises, Inc., dba One Stop Shopping Mart, Docket No. 2008-1354-PST-E on March 27, 2009, assessing \$1,650 in administrative penalties with \$330 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Moran, Docket No. 2008-1359-PWS-E on March 27, 2009, assessing \$110 in administrative penalties with \$22 deferred.

Information concerning any aspect of this order may be obtained by contacting Amanda Henry, Enforcement Coordinator, at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MEMC Pasadena, Inc., Docket No. 2008-1378-AIR-E on March 27, 2009, assessing \$9,639 in administrative penalties with \$1,927 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator, at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding National Stations Inc., Docket No. 2008-1428-PST-E on March 27, 2009, assessing \$6,756 in administrative penalties with \$1,351 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PNS SHELL INC, Docket No. 2008-1429-PST-E on March 27, 2009, assessing \$2,971 in administrative penalties with \$594 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sidney Independent School District, Docket No. 2008-1430-PWS-E on March 27, 2009, assessing \$892 in administrative penalties with \$178 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Valero Refining-Texas, L.P., Docket No. 2008-1437-AIR-E on March 27, 2009, assessing \$10,000 in administrative penalties with \$2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator, at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Chemical LP, Docket No. 2008-1456-AIR-E on March 27, 2009 assessing, \$9,300 in administrative penalties with \$1,860 is deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator, at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Victron Stores, L.P. dba Tiger Mart 2, Docket No. 2008-1460-PST-E on March 27, 2009, assessing \$10,606 in administrative penalties with \$2,121 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator, at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2008-1477-AIR-E on March 27, 2009, assessing \$30,400 in administrative penalties with \$6,080 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator, at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Minsa Corporation, Docket No. 2008-1497-MLM-E on March 27, 2009, assessing \$4,545 in administrative penalties with \$909 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator, at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wayne Dobbins dba 3d Vacuum Service, Docket No. 2008-1534-SLG-E on March 27, 2009, assessing \$3,080 in administrative penalties with \$616 deferred.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator, at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fort Worth Excavating, Inc., Docket No. 2008-1540-AIR-E on March 27, 2009, assessing \$5,450 in administrative penalties with \$1,090 deferred.

Information concerning any aspect of this order may be obtained by contacting Carlie Konkol, Enforcement Coordinator, at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Vopak Logistics Services USA Inc., Docket No. 2008-1545-AIR-E on March 27, 2009, assessing \$5,825 in administrative penalties with \$1,165 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator, at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pasadena Refining System, Inc., Docket No. 2008-1554-AIR-E on March 27, 2009, assessing \$4,975 in administrative penalties with \$995 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2008-1568-AIR-E on March 27, 2009, assessing \$8,000 in administrative penalties with \$1,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator, at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Macedonia Eylau Municipal Utility District 1, Docket No. 2008-1574-PWS-E on March 27, 2009, assessing \$3,239 in administrative penalties with \$647 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator, at (210) 403-4077, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Del Rio, Docket No. 2008-1575-MLM-E on March 27, 2009, assessing \$755 in administrative penalties with \$151 deferred.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MISAQ ENTERPRISES INC. dba Gibby's Food Store, Docket No. 2008-1591-PST-E on March 27, 2009, assessing \$4,296 in administrative penalties with \$859 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator, at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding David Lloyd dba Prairieview Dairy, Docket No. 2008-1597-AGR-E on March 27, 2009, assessing \$6,420 in administrative penalties with \$1,284 deferred.

Information concerning any aspect of this order may be obtained by contacting Lauren Smitherman, Enforcement Coordinator, at (512) 239-5223, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding University of Texas at El Paso, Docket No. 2008-1604-AIR-E on March 27, 2009, assessing \$770 in administrative penalties with \$154 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator, at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gilbert & Geraldine Malooly Children's Trust dba Shell Super Stop 10, Docket No. 2008-1611-AIR-E on March 27, 2009, assessing \$1,250 in administrative penalties with \$250 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator, at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RIYAAN & NOORAIN ENTERPRISES, INC., Docket No. 2008-1612-PST-E on March 27, 2009, assessing \$7,500 in administrative penalties with \$1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator, at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fin & Feather Lodge LLC, Docket No. 2008-1618-MWD-E on March 27, 2009, assessing \$3,200 in administrative penalties with \$640 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator, at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United Fuel & Energy Corporation, Docket No. 2008-1623-PST-E on March 27, 2009, assessing \$4,300 in administrative penalties with \$860 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Clean Harbors Environmental Services, Inc., Docket No. 2008-1624-AIR-E on March 27, 2009, assessing \$5,950 in administrative penalties with \$1,190 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator, at (512) 239-1460, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Scott Halbert dba CITGO Convenience Store, Docket No. 2008-1649-PST-E on March 27, 2009, assessing \$3,379 in administrative penalties with \$675 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator, at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ARISTOS, INC. dba Smart Stop, Docket No. 2008-1655-PST-E on March 27, 2009, assessing \$2,500 in administrative penalties with \$500 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator, at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RG Holdings Inc. dba Allen Shell, Docket No. 2008-1664-PST-E on March 27, 2009, assessing \$5,875 in administrative penalties with \$1,175 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator, at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Coke County Water Supply Corporation, Docket No. 2008-1669-PWS-E on March 27, 2009, assessing \$2,160 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding H. E. Butt Grocery Company, Docket No. 2008-1680-EAQ-E on March 27, 2009, assessing \$2,000 in administrative penalties with \$400 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator, at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Guillermo Garcia Jr., Docket No. 2008-1697-WOC-E on March 27, 2009, assessing \$680 in administrative penalties with \$136 deferred.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator, at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding J. T. HEATH HOME & AUTO SUPPLY COMPANY dba H & H Grocery 1, Docket No. 2008-1781-PST-E on March 27, 2009, assessing \$2,412 in administrative penalties with \$482 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator, at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Burdick Homes, Ltd., Docket No. 2008-1792-WQ-E on March 27, 2009, assessing \$3,000 in administrative penalties with \$600 deferred.

Information concerning any aspect of this order may be obtained by contacting Evette Alvarado, Enforcement Coordinator, at (512) 239-2573, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tom Van Nguyen dba Lisa Food Mart, Docket No. 2008-1865-PST-E on March 27, 2009, assessing \$4,446 in administrative penalties with \$889 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Pace, Enforcement Coordinator, at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mine Service, Ltd., Docket No. 2008-1894-AIR-E on March 27, 2009, assessing \$1,800 in administrative penalties with \$360 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator, at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Edward T. Jacobs dba Spruce Hill Road Duplexes Construction, Docket No. 2008-1509-WQ-E on March 27, 2009, assessing \$700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Curtis J. Shupak, Docket No. 2008-1513-WOC-E on March 27, 2009, assessing \$210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding SIERRA VISTA CONSTRUCTION, INC., Docket No. 2008-1516-WQ-E on March 27, 2009, assessing \$700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding City of Henderson, Docket No. 2008-1524-WQ-E on March 27, 2009, assessing \$700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Terry County, Docket No. 2008-1531-PST-E on March 27, 2009, assessing \$875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding Billy A. Stafford, Docket No. 2008-1576-WOC-E on March 27, 2009, assessing \$210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A citation was entered regarding RIMROCK DEVELOPMENT, L.L.C., Docket No. 2008-1580-WQ-E on March 27, 2009, assessing \$700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator, at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Advantage Asphalt Products, Ltd., Docket No. 2006-1434-AIR-E on March 27, 2009, assessing \$13,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney, at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Hunter Webb, Docket No. 2007-0539-PST-E on March 30, 2009, assessing \$5,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney, at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Liberty Waste Systems, Inc., Docket No. 2007-0795-MLM-E on March 18, 2009, assessing \$2,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney, at (512) 239-0107, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Dewayne Dyer, Docket No. 2007-1295-PST-E on April 3, 2009, assessing \$6,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney, at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Wayne Orsak dba East Texas Tree Service, Docket No. 2007-1587-MSW-E on March 27, 2009, assessing \$1,434 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Barham Richard, Staff Attorney, at (512) 239-0107, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200901376



Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 18, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 18, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: B.K. Trading, Inc.; DOCKET NUMBER: 2008-0416-PST-E; TCEQ ID NUMBER: RN101875177; LOCATION: Highway 271, Talco, Titus County; TYPE OF FACILITY: three inactive underground storage tanks (USTs); RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; and 30 TAC §334.47(a)(2), by failing to permanently remove from service no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: \$3,675; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: Bhayani Investment, Inc. dba Mickey's Pit Stop; DOCKET NUMBER: 2007-1513-PST-E; TCEQ ID NUMBER: RN101674778; LOCATION: 18567 South Interstate 35, Bruceville, McLennan County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to have the required UST records maintained and readily accessible for inspection upon request by agency personnel; 30 TAC §334.7(d)(3) and §334.8(c)(5)(B)(ii), by failing to provide an amended registration for any change or additional information regarding the

USTs within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3475(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form; PENALTY: \$3,500; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: City of Edgewood; DOCKET NUMBER: 2007-1089-PWS-E; TCEQ ID NUMBER: RN101404887; LOCATION: 1/4 mile north on County Road (CR) 3504 from the intersection of CR 2507 and CR 3504, Edgewood, Van Zandt County; TYPE OF FACILITY: public water supply system; RULES VIOLATED: 30 TAC §290.110(e)(2) and §290.111(e)(2), by failing to submit Surface Water Monthly Operating Reports by the tenth day of the month following the end of the reporting period; 30 TAC §290.111(b)(1)(A) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to maintain the turbidity level of the combined filter effluent so as not to exceed 1.0 Nephelometric Turbidity Unit (NTU) and not to exceed 0.3 NTU in at least 95% of the samples tested each month; 30 TAC §290.110(c)(1)(A), by failing to monitor the disinfectant residual of the water in each disinfection zone at least once each day; 30 TAC §290.111(c)(2)(A), by failing to continuously monitor and record the turbidity level of the combined filter effluent at least once every four hours; 30 TAC §290.111(c)(4)(A), by failing to continuously monitor and record the filtered water turbidity level at the effluent of each individual filter at least once every 15 minutes; 30 TAC §290.46(m)(1)(A) and §290.43(c)(6), THSC, §341.036, and TCEQ AO, Docket Number 2004-1540-PWS-E, Ordering Provision Number 3.a.ii, by failing to maintain the potable storage tanks so that they are thoroughly tight against leakage; 30 TAC §290.42(a)(2)(B), by failing to provide for disposition of all plant wastes in accordance with all applicable regulations and state statutes including both liquid and solid waste or by-product material from operation and/or maintenance; 30 TAC §290.46(j)(2) and THSC, §341.036, by failing to promptly eliminate unacceptable plumbing practices as they are discovered, to prevent possible contamination of the water supplied by the regulated entity; 30 TAC §290.46(m), by failing to maintain the general appearance of the system's facilities and equipment; 30 TAC §290.46(s)(2), by failing to perform mandatory calibrations of laboratory equipment used for treatment compliance monitoring; and 30 TAC §290.42(e)(4)(A), by failing to provide a full face self-contained breathing apparatus or air respirator that meets Occupational Safety and Health Association standards for construction and operation which must be located outside the chlorination room in an accessible location; PENALTY: \$16,321; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Laredo; DOCKET NUMBER: 2007-1751-WQ-E; TCEQ ID NUMBER: RN103026043; LOCATION: intersection of West Bustamante Street and East San Francisco Avenue, Laredo, Webb County; TYPE OF FACILITY: wastewater collection system with a manhole; RULES VIOLATED: TWC, §26.121(a)(1) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010681002, Permit Conditions Number 2.g, by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state; and 30 TAC §305.125(9)(A) and TPDES Permit Number WQ0010681002, Monitoring and Reporting Requirements Number 7.b., by failing to submit noncompliance notification for the

unauthorized discharge that occurred on August 24, 2007, within 24 hours of becoming aware of the unauthorized discharge; PENALTY: \$12,933; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(5) COMPANY: Donald Castro dba Villarreal's Ice House; DOCKET NUMBER: 2008-0447-MSW-E; TCEQ ID NUMBER: RN102935491; LOCATION: 18508 Bandera Road, Helotes, Bexar County; TYPE OF FACILITY: property; RULES VIOLATED: 30 TAC §330.15(c), by failing to dispose of municipal solid waste at an authorized facility; PENALTY: \$1,050; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: Mohammad Sultan; DOCKET NUMBER: 2008-0475-PST-E; TCEQ ID NUMBER: RN102401809; LOCATION: 3190 North Main Street, Vidor, Orange County; TYPE OF FACILITY: former retail gasoline service station; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the TCEQ for any change or additional information regarding USTs within 30 days of the occurrence of the change or addition; and 30 TAC §334.47(a)(2) and §334.54(b)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements and by failing to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: \$6,000; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Nisar Ahmad dba C-Store; DOCKET NUMBER: 2005-1557-PST-E; TCEQ ID NUMBER: RN101539716; LOCATION: 1510 West Euleuss Boulevard, Euleuss, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain all required Stage II records on-site and make immediately available for review upon request by a TCEQ representative; 30 TAC §115.242(3), (A), and (E) and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board (CARB) Executive Order(s), and free of defects that would impair the effectiveness of the system; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify the proper operation of the Stage II equipment at least once every 12 months; 30 TAC §334.49(c)(2)(C) and (4) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components were operating properly; 30 TAC §334.50(a)(1)(A) and (b)(2)(A)(i)(III) and TWC, §26.3475(a) and (c)(1), by failing to provide a release detection method capable of detecting a release from any portion of the UST system which contained regulated substances including the tanks, piping, and other ancillary equipment; 30 TAC §334.47(a)(2), by failing to remove an existing UST system that had not been brought into timely compliance with the upgrade requirements; 30 TAC §334.7(a)(1), by failing to register with the TCEQ, on authorized commission forms, a UST in existence on or after September 1, 1987; 30 TAC §334.48(a), by failing to ensure that the UST system is operated, maintained, and managed in a manner that will prevent releases of regulated

substances from such systems; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; PENALTY: \$17,655; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Republic Waste Services of Texas, Ltd.; DOCKET NUMBER: 2007-0654-IHW-E; TCEQ ID NUMBER: RN100218031; LOCATION: 101 Republic Way, Avalon, Ellis County; TYPE OF FACILITY: Type I municipal solid waste disposal facility; RULES VIOLATED: 30 TAC §335.2(a), by failing to prevent the disposal of hazardous waste at an unauthorized facility; PENALTY: \$5,000; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC 175, (713) 422-8916; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Richard A. Scheriger; DOCKET NUMBER: 2008-0885-PST-E; TCEQ ID NUMBER: RN102449584; LOCATION: 1432 Fourth Street, Graham, Young County; TYPE OF FACILITY: four inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to notify the commission of any change or addition within 30 days from the date of the occurrence of the change or addition, or within 30 days from the date on which the owner or operator first became aware of the change or addition; PENALTY: \$3,675; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(10) COMPANY: Swenson Water Supply Corporation; DOCKET NUMBER: 2007-0302-PWS-E; TCEQ ID NUMBER: RN101278083; LOCATION: 400 CR 314, Swenson, Stonewall County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.41(c)(3), by failing to submit a copy of the well completion data for wells numbers one and two to the commission's Water Utilities Section; 30 TAC §290.42(1), by failing to compile a plant operation manual and to keep it up-to-date for operator review and reference; 30 TAC §290.43(c)(8), by failing to maintain the exterior surface of the ground storage tank in accordance with American Water Works Association (AWWA) standards; 30 TAC §290.43(e), by failing to provide a properly constructed intruder-resistant fence around the pressure tank; 30 TAC §290.46(f)(3)(A) and (E), by failing to maintain for two years, records of weekly chemical use, amount of water treated each week, dates that ground storage tanks and other facilities were cleaned, and maintenance records of all water system equipment and facilities and for at least ten years; 30 TAC §290.46(g), by failing to document disinfection of new or repaired lines in accordance with AWWA standards; 30 TAC §290.46(h), by failing to have a supply of calcium hypochlorite on hand for use when making repairs, setting meters, and disinfecting new mains prior to placing them in service; 30 TAC §290.46(i), by failing to adopt a plumbing ordinance, regulation, or service agreement with provisions for proper enforcement; 30 TAC §290.46(j), by failing to issue a customer service inspection certificate prior to providing continuous water service on any existing service; 30 TAC §290.46(l), by failing to document the flushing of dead end mains at monthly intervals or as needed if water quality complaints are received; 30 TAC §290.46(m)(1)(A), by failing to conduct and record the results of annual inspections for the ground storage tank; 30 TAC §290.46(m)(1)(B), by failing to conduct and record the results of annual inspections for the pressure tank; 30 TAC §290.46(n)(2), by failing to maintain an accurate and up-to-date distribution map so that valves and mains can be easily located during emergencies; 30

TAC §290.110(c)(5)(A), by failing to document the results of weekly disinfectant residual monitoring; 30 TAC §290.110(e)(4) and (5), by failing to submit a quarterly distribution report to the TCEQ by the tenth day of the month following the reporting period; 30 TAC §290.118(b), by failing to provide water that meets the commission's secondary constituent levels for chloride, sulfate, and total dissolved solids; and 30 TAC §290.121(a), by failing to maintain an up-to-date chemical and microbiological monitoring plan; PENALTY: \$2,250; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Abilene Regional Office, 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(11) COMPANY: Thurman Calcote dba 9 Mile Station Cafe; DOCKET NUMBER: 2008-0852-PST-E; TCEQ ID NUMBER: RN101751311; LOCATION: 7888 Farm-to-Market Road 592, Wheeler, Wheeler County; TYPE OF FACILITY: former retail gasoline station; RULES VIOLATED: 30 TAC §334.47(a), by failing to permanently remove from service no later than 60 days after the prescribed update three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: \$2,625; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(12) COMPANY: Tuan Nguyen dba AM Food Mart; DOCKET NUMBER: 2008-1374-PST-E; TCEQ ID NUMBER: RN102653201; LOCATION: 7530 Harrisburg Boulevard, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; and 30 TAC §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition as specified by the manufacturer and/or any applicable CARB Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: \$3,937; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200901365

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 7, 2009



Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 18, 2009**. The commission will consider any writ-

ten comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 18, 2009**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Deloris Petty dba Denton Estates Mobile Home Park; DOCKET NUMBER: 2008-1967-PWS-E; TCEQ ID NUMBER: RN101174894; LOCATION: north end of Cottonwood Lane, Denton County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.274(a), (b), and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st of each year, by failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility, and that the information in the CCR is correct and consistent with the compliance monitoring data to the TCEQ by July 1st of each year; TWC, §5.702 and 30 TAC §290.51(a)(3), by failing to pay Public Health Service (PHS) fees for Fiscal Years 2003 - 2008, including all late fees and interest for TCEQ Account Number 90610016; 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect and submit monthly water samples for bacteriological analysis for the months of August - December 2004, and January - May 2005, and by failing to provide public notification for the failure to collect water samples for the months of August - December 2004, and January - May 2005; 30 TAC §290.46(q)(2), by failing to submit documentation showing that Petty followed the flow chart in 30 TAC §290.47(h), to determine if a boil water notification must be issued in the event of a loss of distribution system pressure prior to returning the facility to service after a water outage on September 23, 2006; 30 TAC §290.46(e), by failing to operate the facility by a licensed operator who holds a class "D" or higher license; 30 TAC §290.46(f), (3)(A)(i), (ii), (iv) - (vi), (B)(iii), (vi), (D)(i), (ii), and (E)(ii), by failing to keep on file and make available for commission review, the facility's operating records; 30 TAC §290.46(m)(1)(A), by failing to perform annual inspections of the facility's ground storage tank; 30 TAC §290.46(m)(1)(B), by failing to perform annual inspections of the facility's pressure tank; 30 TAC §290.41(c)(1)(F), by failing to obtain a sanitary control easement for well numbers one and two; 30 TAC §290.45(b)(1)(C)(i), by failing to provide a minimum well capacity of 0.6 grams per minute (gpm) per connection; 30 TAC §290.46(n)(3), by failing to submit well completion data to the commission prior to placing the wells into service so that the wells may be evaluated and approved for public use; 30 TAC §290.42(1), by failing to compile and maintain an up-to-date plant operations manual for operator review and reference; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility; 30 TAC §290.43(c), by failing to provide a ground

storage tank that meets American Water Works Association (AWWA) standards; 30 TAC §290.41(c)(3)(O) and §290.43(e), by failing to provide an intruder-resistant fence for the wells and ground storage tank that can be locked during periods of darkness or when the facility is unattended; 30 TAC §290.43(d)(2), by failing to provide a release device on the pressure tank; 30 TAC §290.45(b)(1)(C)(ii) and THSC, §341.0315(c), by failing to provide ground storage tank capacity of 200 gallons per connection; 30 TAC §290.45(b)(1)(C)(iv) and THSC, §341.0315(c), by failing to provide a pressure tank capacity of 20 gallons per connection; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0315(c), by failing to provide two or more service pumps having a total capacity of 2.0 gpm per connection; 30 TAC §290.41(c)(1)(A), by failing to locate well number one greater than 50 feet from a septic tank; 30 TAC §290.41(c)(33)(J), by failing to provide a concrete sealing block around well numbers one and two that extends a minimum of three feet in all directions; 30 TAC §290.41(c)(3)(N), by failing to provide an operable flow meter on both well numbers one and two, to measure production yields, and provide for the accumulation of water production data; 30 TAC §290.46(v), by failing to securely install the facility's electrical wiring in compliance with local or national electrical code; and 30 TAC §290.44(d)(4), by failing to provide metering devices at each service connection; PENALTY: \$22,844; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Gilbert Navarro; DOCKET NUMBER: 2008-0723-PST-E; TCEQ ID NUMBER: RN101828275; LOCATION: 211 East Main Street, Crosbyton, Crosby County; TYPE OF FACILITY: three inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, three underground storage tanks (USTs) for which any applicable component of the system was not brought into timely compliance with the upgrade requirements and by failing to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: \$15,750; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3520, (806) 796-7092.

(3) COMPANY: Gladys Carter; DOCKET NUMBER: 2008-0351-PST-E; TCEQ ID NUMBER: RN101538684; LOCATION: 5065 United States Highway 377 South, Krugerville, Denton County; TYPE OF FACILITY: property containing inactive USTs tanks; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after prescribed implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to notify the TCEQ of any change or additional information regarding USTs within 30 days from the date of occurrence of the change or addition; PENALTY: \$6,300; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Henry Chennault; DOCKET NUMBER: 2008-1427-PST-E; TCEQ ID NUMBER: RN101811883; LOCATION: Highway 87 and Granger Avenue, Westhoff, DeWitt County; TYPE OF FACILITY: three inactive USTs; RULES VIOLATED: 30 TAC §334.47(a)(7), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirement; PENALTY: \$5,250; STAFF ATTOR-

NEY: Stephanie J. Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Corpus Christi Regional Office, 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(5) COMPANY: John Tran dba Quality Cleaners and dba Deluxe Drycleaning; DOCKET NUMBER: 2008-1047-DCL-E; TCEQ ID NUMBER: RN103953683, RN104137443, RN104137435, and RN10437518; LOCATION: 2844 Rev Drive Ransom Howard Street (Facility 1), 1920 9th Avenue (Facility 2), 535 Rev Drive Ransom Howard Street (Facility 3), Port Arthur, and 3889 Main Avenue (Facility 4), Groves, Jefferson County; TYPE OF FACILITY: dry cleaning drop station facilities; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, and TCEQ DO, Docket Number 2006-1428-DCL-E, Ordering Provision 2.a., by failing to renew facility 1's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; 30 TAC §337.11(e), THSC, §374.102, and TCEQ DO Docket Number 2006-1428-DCL-E, Ordering Provision 2.a., by failing to renew facility 4's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; 30 TAC §337.11(e), THSC, §374.102, TCEQ DO Number 2006-1428-DCL-E, Ordering Provision 2.a., by failing to renew facility 2's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; 30 TAC §337.11(e), THSC, §374.102, TCEQ DO, Docket Number 2006-1428-DCL-E, Ordering Provision Number 2.a., by failing to renew facility 3's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning and/or drop station facility; 30 TAC §337.14(c), TWC, §5.702; TCEQ DO, Docket Number 2006-1428-DCL-E, Ordering Provision Numbers 1 and 2.b., by failing to pay outstanding Dry Cleaner fees, Administrative Penalties, and associated late fees for TCEQ Financial Account Numbers 24002331 and 23800327; PENALTY: \$6,500; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: Linda Hill Barton; DOCKET NUMBER: 2008-0425-PST-E; TCEQ ID NUMBER: RN102839396; LOCATION: Highway 14 North, Kosse, Limestone County; TYPE OF FACILITY: USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay UST fees and associated late fees for TCEQ Financial Assurance Account Number 0022080U for Fiscal Years 1990 - 2006; PENALTY: \$7,875; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0265; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: M.Y.M. Investment, Inc. dba Kwik & Save Food Store; DOCKET NUMBER: 2008-0532-PST-E; TCEQ ID NUMBER: RN102394160; LOCATION: 5602 Allendale Road, Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b) and (2)(A)(i)(III) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor recovery system at least once every 12 months; PENALTY: \$8,193; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(8) COMPANY: Oscar Food Corporation dba Circle A Store; DOCKET NUMBER: 2006-1855-PST-E; TCEQ ID NUMBER: RN102409034; LOCATION: 14525 Wood Forest Boulevard, Houston, Harris County; TYPE OF FACILITY: 14525 Wood Forest Boulevard, Houston, Harris County; RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs at a station; 30 TAC §334.10(b), by failing to maintain and make available legible copies of all required UST records for inspection upon request by agency personnel; 30 TAC §115.246(1), (3) - (6), and (7)(A), and THSC, §382.085(b), by failing to maintain Stage II records on-site at the station ordinarily manned during business hours, and make immediately available for review upon request; 30 TAC §115.242(3), (A), (B), and (9), and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system in proper operation condition as specified by the manufacturer and/or any applicable California Air Resources Board (CARB) Executive Order(s), and free of defects that would impair the effectiveness of the system; 30 TAC §115.244(3) and THSC, §382.085(b), by failing to conduct monthly inspections of the Stage II vapor recovery system; 30 TAC §334.51(b)(1)(B) and TWC, §26.3475(c)(2), by failing to provide overfill prevention equipment for the UST system; 30 TAC §334.49(c)(2)(C) and (4)(C) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly; 30 TAC §334.50(b)(1)(A), (2)(A)(i)(III), (ii), and (d)(4)(A)(ii)(II) and TWC, §26.3475(a) and (c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as a motor fuel; PENALTY: \$16,770; STAFF ATTORNEY: Rebecca Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(9) COMPANY: Patricia A. Farris; DOCKET NUMBER: 2008-0436-PST-E; TCEQ ID NUMBER: RN101812436; LOCATION: 7220 Highway 8, Douglasville, Cass County; TYPE OF FACILITY: property with out of service underground petroleum storage tanks; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into compliance with the upgrade requirements; and 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs within 30 days from the date of the occurrence of the change or addition; PENALTY: \$6,300; STAFF ATTORNEY: Benjamin Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: Raul R. Martinez; DOCKET NUMBER: 2007-0810-PST-E; TCEQ ID NUMBER: RN101534147; LOCATION: 1521 Lincoln Avenue, Fort Worth, Tarrant County; TYPE OF FACILITY: real property; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirement; PENALTY: \$5,250; STAFF ATTORNEY: Tommy Tucker Henson II, Litigation Division, MC 175, (512) 239-0946; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Tam Phuong Corporation; DOCKET NUMBER: 2006-1355-DCL-E; TCEQ ID NUMBER: RN104065958; LOCATION: 2006-1355-DCL-E; TYPE OF FACILITY: 1001 Pineloch Drive, Suite 800, Houston, Harris County; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaner and/or drop station facility; and 30 TAC §337.14(c) and TWC, §5.702, by failing to pay outstanding dry cleaning drop station registration fees for TCEQ Financial Account Number 24001591; PENALTY: \$1,185; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0265; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(12) COMPANY: Y-D Enterprises, LLC; DOCKET NUMBER: 2008-1239-WQ-E; TCEQ ID NUMBER: RN105359749; LOCATION: 8400 Block of Clifford, White Settlement, Tarrant County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with construction activity; PENALTY: \$3,150; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200901366

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 7, 2009



Notice of Opportunity to Comment on Shut Down/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 18, 2009**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority.

Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 18, 2009**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Ari Ari Ltd dba Desoto Beverages; DOCKET NUMBER: 2008-0445-PST-E; TCEQ ID NUMBER: RN100586189; LOCATION: 901 North Interstate 35 East, Desoto, Dallas County; TYPE OF FACILITY: beverage store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the underground storage tank (UST) system; 30 TAC §334.50(d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records at least once every month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; by failing to provide release detection; and by failing to conduct inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II vapor recovery system at least once every 12 months; and 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; PENALTY: \$19,471; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Reddy-Gator, Inc. and Swati Holding, Company dba Gator Stop 3; DOCKET NUMBER: 2008-1005-PST-E; TCEQ ID NUMBER: RN101663771; LOCATION: 16074 Interstate Highway 35 South, Ross, McLennan County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(c)(1), by failing to provide release detection by failing to conduct reconciliation of inventory control records at least once a month, in a manner sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons and by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.8(c)(5)(C), by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in the immediate area of the fill tube for each regulated UST at the facility according to the UST registration and self-certification form; and 30 TAC §115.224(1) and THSC, §382.085(b), by failing to conduct inspections for liquid leaks, visible vapors, and significant odors resulting from gasoline transfer; PENALTY: \$17,850; STAFF ATTORNEY: Stephanie J. Frazee, Litigation Division, MC 175, (512)

239-3693; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200901367

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 7, 2009



Notice of Water Quality Applications

The following notices were issued during the period of March 18, 2009 through April 3, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF LUBBOCK which operates the Alex Ty Cooke Steam Electric Station, has applied for a renewal of TPDES Permit No. WQ0001895000, which authorizes the discharge of cooling tower blowdown and previously monitored effluent (PME) (low volume waste) at a daily average flow not to exceed 800,000 gallons per day via Outfall 001, and the disposal of low volume waste via evaporation. The facility is located at 3500 East Slaton Highway, 4,000 feet northwest of the intersection of Southeast Drive and East Slaton Highway in the City of Lubbock, Lubbock County, Texas.

MARKWEST JAVELINA COMPANY, L.L.C. which operates Javelina Gas Plant, has applied for a major amendment to TPDES Permit No. WQ0003137000 to authorize an increase in the daily average flow limit from 288,000 gallons per day to 478,000 gallons per day; an increase in the daily maximum flow limit from 750,000 gallons per day to 1,130,000 gallons per day at Outfall 001; to authorize less stringent mass based-effluent limitations at Outfall 001; and to authorize less stringent concentration based-effluent limitations for total suspended solids at Outfall 001. The current permit authorizes the discharge of treated process wastewater, utility wastewater, and storm water at a daily average flow not to exceed 288,000 gallons per day via Outfall 001. The draft permit authorizes the discharge of treated process wastewater, utility wastewater, and storm water at a daily average flow not to exceed 478,000 gallons per day via Outfall 001. The facility is located at 5314 Interstate Highway 37, on the north side, between McBride Lane and Navigation Boulevard in the City of Corpus Christi, Nueces County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

SYNAGRO OF TEXAS-CDR, INC. has applied for a renewal of Permit No. WQ0004504000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 475.7 acres. This permit will not authorize a discharge of pollutants into waters in the State. The land application site is located 7 miles north of north of Paynor, on Farm-to-Market Road 315 at the Bill Miller Tree Farm in Henderson County, Texas.

BIGLER LAND, L.L.C. which operates the Bigler Pasadena Plant, which manufacture high purity isobutylene, marine fuel oil, gasoline

blend stock, propane, and butane/butane; and operates a for-hire terminal that stores bulk chemicals, fuels, and specialty oils with associated loading and unloading facilities, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004867000, to authorize the discharge of cooling tower blowdown and boiler blowdown at a daily average flow not to exceed 55,000 gallons per day via Outfall 001. The facility is located approximately 9,500 feet north of the intersection of North South Street (Preston Road) and State Highway 225 and within an industrial complex shared by Albermarle Corporation, Ethyl Corporation, MEMC and Bigler, Harris County, Texas.

CITY OF WAXAHACHIE has applied for a renewal of TPDES Permit No. WQ0010379001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 8,000,000 gallons per day. The facility is located south of MKT Railroad and west of Waxahachie Creek in the southern portion of the City of Waxahachie in Ellis County, Texas.

CITY OF GOLDTHWAITE has applied for a renewal of TPDES Permit No. WQ0010459003, which authorizes the discharge of treated water treatment filter backwash water at a daily average flow not to exceed 22,000 gallons per day. The facility is located at the northeast corner of State Highway 16 and Lover's Lane, approximately 230 feet north of State Highway 16 in Mills County, Texas.

CITY OF STAMFORD has applied for a renewal of TPDES Permit No. WQ0010472002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 560,000 gallons per day. The facility is located approximately 8,400 feet northeast of the intersection of the FW&D Railroad and State Highway 6 and adjacent to Stink Creek in Jones County, Texas.

CITY OF LORENZO has applied for a renewal of Permit No. WQ0010988002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 210,000 gallons per day via surface irrigation of 100 acres of non-public access agricultural land. The wastewater treatment facility and disposal site are located northeast of the City of Lorenzo, approximately 1.5 miles northeast of the intersection of U.S. Highway 82 and State Route 378 in Crosby County, Texas.

BELL COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 2 has applied for a renewal of TPDES Permit No. WQ0011090001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 94,000 gallons per day. The facility is located immediately west of State Highway 95 approximately 700 feet south of the intersection of State Highway 95 and Farm-to-Market Road 436 in Bell County, Texas.

CITY OF JUSTIN has applied for a major amendment to TPDES Permit No. WQ0011312001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 400,000 gallons per day to a daily average flow not to exceed 800,000 gallons per day. The facility is located approximately 600 feet east of Farm-to-Market Road 156 and approximately 1,600 feet south of Farm-to-Market Road 407 (1st Street) in Denton County, Texas.

BELL COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied for a renewal of TPDES Permit No. WQ0014387001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day. The facility is located on the south side of Farm-to-Market Road 2410, approximately 0.4 mile west of the intersection of Stillhouse Lake Road and Chapparral Road in Bell County, Texas.

BAY BLUFF, L.P. has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014931001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility will be located approximately 2,200 feet north-northeast of the intersection of Bay Area Boulevard and Red Bluff Road in Harris County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200901374

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: April 8, 2009



Notice of Water Rights Applications

Notice issued March 30, 2009

APPLICATION NO. 12388; Energy Transfer Fuel, LP, Applicant, 711 Louisiana, Suite 900, Houston, Texas 77002, has applied for a temporary water use permit to divert and use not to exceed 79.8 acre-feet of water within one year from two diversion points, located on the Trinity River, Trinity River Basin, for industrial purposes in Navarro and Henderson Counties. More information on the application and how to participate in the permitting process is given below. The application and partial fees were received on October 6, 2008. Additional information and fees were received on December 10, 2008, January 30, 2009 and February 16, 2009. The application was declared administratively complete and accepted for filing on February 17, 2009. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by April 17, 2009.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200901375

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: April 8, 2009



Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on April 3, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Juan Gomez; SOAH Docket No. 582-09-2075; TCEQ Docket No. 2008-0143-LII-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Juan Gomez on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200901377

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: April 8, 2009



General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Texas Natural Resources Code, notice is hereby given that Jerry Patterson, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by William E. Merton, Licensed State Land Surveyor, conducted October 1st and 8th 2007, locating the following shoreline boundary:

Survey in Galveston County, a portion of the Texas Gulf Coast shoreline out of the Trimble & Lindsey Section 2, Hall & Jones Survey, Abstract 121, including the line of MHHW along West Bay of Galveston Bay from approximately 450 feet west of the northerly extension of the west R.O.W. of 8-Mile Road to approximately 1935 feet east of the northerly extension of the east R.O.W. of 8-Mile Road.

This survey is intended to provide pre-project baseline information related to an erosion response activity on coastal public lands. An owner

of uplands adjoining the project area is entitled to continue to exercise littoral rights possessed prior to the commencement of the erosion response activity, but may not claim any additional land as a result of accretion, reliction, or avulsion resulting from the erosion response activity.

For a copy of this survey or more information on this matter, contact Bill O'Hara, Director of the Survey Division, Texas General Land Office by phone at (512) 463-5212, e-mail bill.ohara@glo.state.tx.us, or fax (512) 463-5223.

TRD-200901302

Larry L. Laine

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: April 3, 2009



Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rate

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 5, 2009, at 3:00 p.m. to receive public comment regarding the proposed Medicaid payment rate for case management services for the Blind Children's Vocational Discovery and Development Program (BCVDDP). The public hearing will be held in the Padre Island Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.082 and 1 Texas Administrative Code (TAC), §355.201(e) - (f), which require public hearings on proposed Medicaid reimbursements.

Proposal. The new payment rate for case management services for the BCVDDP is proposed to be effective June 1, 2009.

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8381, which addresses the reimbursement methodology for case management services for the BCVDDP.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after April 20, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Josie Wheatfall by telephone at (512) 491-1445; by fax at (512) 491-1983; or by e-mail at Josie.Wheatfall@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of or in addition to oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Josie Wheatfall, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Josie Wheatfall at (512) 491-1983; or by e-mail to Josie.Wheatfall@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Josie Wheatfall, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids should contact Josie Wheatfall at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-200901373

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 8, 2009

◆ ◆ ◆
Department of State Health Services

Designation of The Bridge as a Site Serving Medically Underserved Populations

The Department of State Health Services (department) is required under the Occupations Code, §157.052, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of such designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has proposed designating the following as a site serving medically underserved populations: The Bridge, 1818 Corsicana Street, Dallas, Texas 75201. The designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state, or locally funded health care programs.

Oral and written comments on this designation may be directed to Brian King, Program Director, Health Professions Resource Center - MC 1898, Center for Health Statistics, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347; telephone (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-200901298
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: April 2, 2009

◆ ◆ ◆
Texas Historical Commission

Correction of Error

The Texas Historical Commission proposed amendments to 13 TAC §21.7 and §21.9 in the March 6, 2009, issue of the *Texas Register* (34 TexReg 1516). On page 1516, left column, third paragraph from the bottom, and page 1517, right column, first complete paragraph, there are errors in the statements of statutory authority. The paragraphs cite "Texas Government Code, §442.005(u)," but the correct reference is "Texas Government Code, §442.005(q)."

Both paragraphs should read as follows:

"The revised sections are proposed under the Texas Government Code, §442.005(q), which authorizes the Commission to adopt rules to carry out its programs. The revised sections implement changes to Texas Government Code, §442.006. No other statutes are affected."

TRD-200901300

◆ ◆ ◆
Lower Rio Grande Valley Development Council

Notice of Public Meeting

The Lower Rio Grande Valley Development Council (LRGVDC) will host a public meeting to discuss proposed Hazardous Cargo Route for Hidalgo County. This meeting will allow the public the opportunity to view the project details and provide comments. For additional information, call Chemical Response & Remediation Contractors, Inc. (CRRC) Attention: Perry Gonzalez at (956) 365-4252.

Date: Friday, April 24, 2009

Place: Rio Transit Center, 510 Pleasantview Drive, Weslaco, Texas

Time: 5:00 p.m. to 8:00 p.m.

El Consejo del Desarrollo Del Valle del Río Grande (LRGVDC) los invita a una junta pública para discutir la propuesta de una ruta de carga de material peligroso para el Condado de Hidalgo. Esta reunión permitirá al público la oportunidad de ver los detalles de proyecto y proporcionar comentarios. Para información adicional, favor de comunicarse con Chemical Response & Remediation Contractors, Inc. (CRRC) con el Sr. Perry González al (956) 365-4252.

Fecha: Viernes, April 24, 2009

Lugar: Rio Transit Center, 510 Pleasantview Drive, Weslaco, Texas

Hora: 5:00 p.m. to 8:00 p.m.

TRD-200901306
Ken Jones
Executive Director
Lower Rio Grande Valley Development Council
Filed: April 3, 2009

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of public hearing and opportunity for public comment on an application by Msrs. Joe Long and Mark Stephenson to obtain a Texas Parks and Wildlife Department (TPWD) permit to remove or disturb 20,000 cubic yards of sand and gravel per month from the bed of the Llano River in Llano County for construction projects.

The location is: starting at a point 12 miles downstream from the State Highway 16, crossing and extending downstream for approximately one mile, to a point approximately two miles upstream of FM 3404.

The hearing will be held on May 12, 2009 at 10:00 a.m. at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or a newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Rollin MacRae, TPWD, by mail to the above address; e-mail rollin.macrae@tpwd.state.tx.us; phone (512) 389-4639.

TRD-200901372
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: April 7, 2009

◆ ◆ ◆
Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on March 31, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc. d/b/a Suddenlink Communications for an Amendment to its State-

Issued Certificate of Franchise Authority, Project Number 36855 before the Public Utility Commission of Texas.

The requested CFA service area footprint includes the City Limits of Breckenridge and Forney, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by telephone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36855.

TRD-200901309

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: April 3, 2009



Notice of Application for Approval of a Revised Nodal Market Implementation Surcharge

On March 31, 2009, the Electric Reliability Council of Texas, Inc. (ERCOT) filed with the Public Utility Commission of Texas (Commission) its application for approval of a revised nodal market implementation surcharge. The purpose of the nodal surcharge is to fund the personnel, software, equipment, training and services necessary to develop and implement the Nodal Market called for in the ERCOT Nodal Protocols approved by the Commission. In May 2008, in Docket Number 35428, the Commission approved a nodal surcharge in the amount of \$0.169

per megawatt hour (MWh) to be charged to Qualified Scheduling Entities (QSEs) representing generation resources. The nodal surcharge is calculated by multiplying the surcharge factor of \$0.169/MWh by the total net metered generation aggregated to the QSE level. ERCOT requests that it be authorized to increase the nodal surcharge, effective no later than January 1, 2010. ERCOT requests that the Commission increase the nodal surcharge so that ERCOT may recover additional costs of the Nodal Program not included in the estimates available when the \$0.169/MWh nodal surcharge was approved in Docket Number 35428. ERCOT does not propose that the entities affected by the revised nodal surcharge will be any different from those affected by the existing nodal surcharge. The impact on the entities that pay the nodal surcharge will vary depending on the amount of the increase in the surcharge approved by the Commission. ERCOT requests that the Commission: (1) adopt the interim surcharge of \$0.226 per MWh included in the pending settlement of PUC Docket Number 36412, *ERCOT Application For Approval of a Revised Nodal Surcharge and Request For Interim Relief* for the remainder of calendar year 2009; and (2) approve a revised nodal surcharge, effective January 1, 2010, with the surcharge rate dependent upon the implementation date for the interim surcharge, as set forth in Table 1 below.

ERCOT requests that the revised rate be effective January 1, 2010, and remain in effect until all Nodal Program costs are recovered, currently expected to be in 2014. Alternatively, if the Commission rejects the interim surcharge settlement and leaves the nodal surcharge at its current level of \$0.169 per MWh for the remainder of 2009, ERCOT requests that the Commission approve a revised nodal surcharge of \$0.375 per MWh, also effective January 1, 2010.

Table 1: Impact of interim rate implementation date on level of revised Nodal surcharge effective January 1, 2010

Implementation date of interim rate increase from \$0.169 to \$0.226 per MWh	Rate needed January 1, 2010 to ensure 40% revenue contribution during development
June 1, 2009	\$0.335
July 1, 2009	\$0.341
August 1, 2009	\$0.347
September 1, 2009	\$0.353
No increase in \$0.169 rate until January 1, 2010	\$0.375

The ERCOT Board of Directors approved ERCOT's filing for a revised nodal surcharge at its March 17, 2009 meeting. ERCOT expects that approval of the revised nodal surcharge will enable ERCOT to increase its revenues sufficiently to pay the costs of the Nodal Program in a financially prudent manner. ERCOT estimates that the total costs recoverable from the nodal surcharge will be \$604.1 million.

The deadline for intervention in the proceeding is May 1, 2009.

Persons who wish to intervene in or comment in this proceeding should notify the Public Utility Commission of Texas by the intervention deadline. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. A request to intervene shall include a statement of

position containing a concise statement of the requestor's position on the application, a concise statement of each question of fact, law, or policy that the requestor considers at issue and a concise statement of the requestor's position on each issue identified.

ERCOT will post notice and a copy of its application on its website at http://www.ercot.com/about/governance/legal_notices.html. Interested parties may also access ERCOT's application through the Public Utility Commission's web site at <http://www.puc.state.tx.us> under Docket Number 36851, *Application of the Electric Reliability Council of Texas for Approval of a Revised Nodal Market Implementation Surcharge*.

TRD-200901361

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 6, 2009



Notice of Application for Designation as a Resale Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on April 1, 2009, for designation as a resale eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.419.

Docket Title and Number: Application of VoicePac Prepaid, LLC for Designation as a Resale Eligible Telecommunications Provider Pursuant to P.U.C. Substantive Rule §26.419. Docket Number 36862.

The Application: The company is requesting resale ETP designation in order to be eligible to receive funds from the Texas Universal Service Fund for reimbursement of the discounts provided through the Lifeline program.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by May 7, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission's Customer Protection Division at (512) 936-7120 or 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas at 1-800-735-2989 to reach the commission's toll free number 1-888-782-8477. All comments should reference Docket Number 36862.

TRD-200901308
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 3, 2009



Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on April 3, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of A Plus Telecom, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 36870 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service.

Applicant's requested SPCOA geographic area includes the area of Texas comprising the Dallas Local Access and Transport Area.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than April 22, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36870.

TRD-200901370

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2009



Public Notice of Workshop on Implementation Project Relating to Advanced Metering

The staff of the Public Utility Commission of Texas (commission) will hold a workshop for Task 145, from the Advanced Metering Implementation Team (AMIT) working group. The workshop will be held on Tuesday, May 12, 2009, at 1:00 p.m., in the Commissioners' Hearing Room located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Documents from the AMIT meetings and the associated task documents are available on the commission website at <http://www.puc.state.tx.us/electric/projects/34610/34610.cfm>. Discussion will be focused on the opportunities for reducing field completion times for service orders for premises with a provisioned AMS meter.

Questions concerning the workshop or this notice should be referred to Christine Wright, Competitive Markets Division, (512) 936-7376. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200901369
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 7, 2009



Workforce Solutions Brazos Valley Board

Notice of Release of Request for Proposals

On April 6, 2009, Workforce Solutions Brazos Valley Board (WSBVB) will release a Request for Proposals (RFP) for Child Care Management Data System Processes Enhancement. The proposal requirements are contained in the Request for Proposal which may be viewed and printed online at www.bvjobs.org. The Board is seeking one or more contractors to provide the requested services.

Due Date:

An original and four copies of a written proposal are due to the Board's offices no later than 4:00 p.m. on April 27, 2009. No proposals will be accepted after this deadline.

Proposals may be hand delivered or sent by FedEx or UPS to:

Shawna Rendon

Workforce Solutions Brazos Valley Board

3991 East 29th St.

Bryan, Texas 77802

Attention: Child Care Management Data System Processes Enhancement RFP Response

Proposals may be mailed by the USPS to:

Shawna Rendon

Workforce Solutions Brazos Valley Board

P.O. Drawer 4128

Bryan, Texas 77805

Attention: Child Care Management Data System Processes Enhancement RFP Response

Potential respondents may pose written questions concerning this RFP by email. Contact Shawna Rendon at schambers@bvcog.org. No questions will be accepted after April 16, 2009. No bidders conference will be held for this RFP. The contact person for this RFP is Shawna Rendon at (979) 595-2800.

TRD-200901294

Tom Wilkinson

Executive Director

Workforce Solutions Brazos Valley Board

Filed: April 1, 2009



Notice of Release of Request for Quotes

On April 6, 2009, the Workforce Solutions Brazos Valley Board (WS-BVB) will release a Request for Quote (RFQ) for speakers for child care provider workshops and for employer business seminars. The quote requirements are contained in the Request for Quote which may be viewed and printed online at www.bvjobs.org. The Board is seeking one or more contractors to provide the requested services.

Due Date:

An original and four copies of a written proposal are due to the Board's offices no later than 4:00 p.m. on May 5, 2009. No quotes will be accepted after this deadline.

Quotes may be hand delivered or by FedEx or UPS to:

Shawna Rendon

Workforce Solutions Brazos Valley Board

3991 East 29th Street

Bryan, Texas 77802

Attention: Workshop Speakers RFQ Response

Quotes may be mailed by USPS to:

Shawna Rendon

Workforce Solutions Brazos Valley Board

P.O. Drawer 4128

Bryan, Texas 77805

Potential respondents may pose written questions concerning this RFQ by email. Contact Shawna Rendon at schambers@bvcog.org. No questions will be accepted after April 21, 2009. The responses to these questions will be posted on www.bvjobs.org. The contact person for this RFQ is Shawna Rendon (979) 595-2800.

TRD-200901295

Tom Wilkinson

Executive Director

Workforce Solutions Brazos Valley Board

Filed: April 1, 2009



How to Use the Texas Register

Information Available: The 14 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules - sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online through the Internet. The address is: <http://www.sos.state.tx.us>. The *Register* is available in an .html version as well as a .pdf (portable document format) version

through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at <http://www.sos.state.tx.us/tac>. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; TAC stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Table of TAC Titles Affected*. The table is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*. If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with one or more *Texas Register* page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

40 TAC §3.704.....950, 1820

The *Table of TAC Titles Affected* is cumulative for each volume of the *Texas Register* (calendar year).